CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 530

[illegible]EKINS VAN LINES, INC.; CHEW CHICK, DOING BUSINESS AS BAY CITY HAULING CO.; KENNETH C. CLARK, ET AL., ETC., ET AL., APPELLANTS,

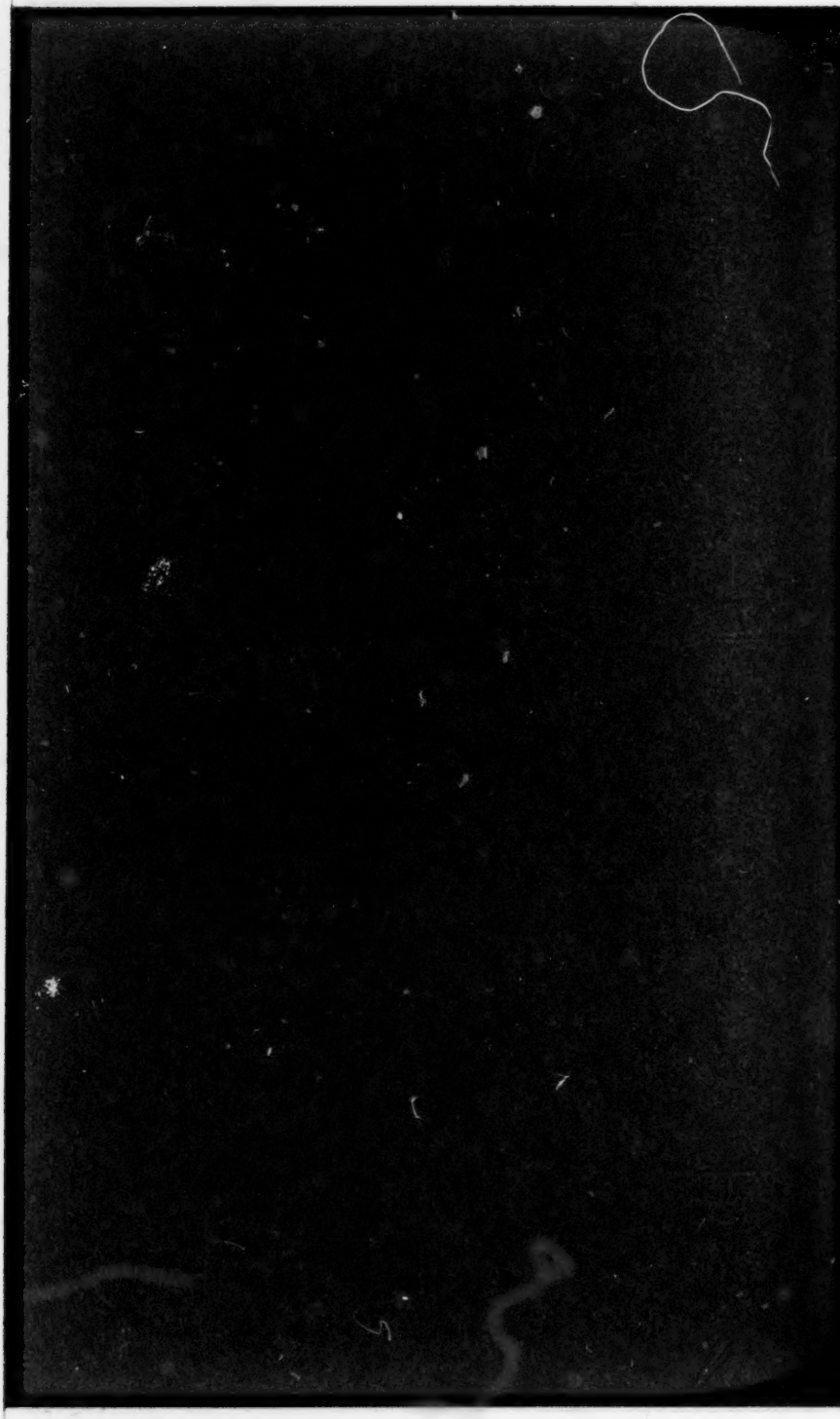
vs.

[illegible]AY L. RILEY, AS STATE CONTROLLER OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 5, 1939.

(33,839)



(33,839)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 530

BEKINS VAN LINES, INC.; CHEW CHICK, DOING BUSINESS AS BAY CITY HAULING CO.; KENNETH C. CLARK, ET AL., ETC., ET AL., APPELLANTS,

vs.

RAY L. RILEY, AS STATE CONTROLLER OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

INDEX

	Original	Print
Record from the district court of the United States, Northern California	1	1
Bill of complaint	1	1
Order to show cause (omitted in printing)	20	
Notice of motion for interlocutory injunction	21	15
Admission of service of notice, etc	23	16
Opposition to application for interlocutory injunction	24	16
Motion to dismiss	27	18
Notice of hearing (omitted in printing)	29	
Argument and submission (omitted in printing)	30	
Orders granting motion to dismiss (omitted in printing)	32	
Amended order and decree	33	19
Petition for appeal (omitted in printing)	34	
Order allowing appeal	35	20
Assignments of error	36	20
Bond on appeal (omitted in printing)	41	
Præcipe for transcript of record (" " ")	43	
Stipulation amending præcipe (" " ")	45	
Clerk's certificate (" " ")	46	
Citation (" " ")	47	
Statement of points to be relied upon and designation of parts of record to be printed	49	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1928

[fols. a-1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF CALIFORNIA.

No. 2159S

BEKINS VAN LINES, INC., a Corporation; CHEW CHICK, Doing Business as Bay City Hauling Co.; Kenneth C. Clark and Andrew B. Clark, Copartners, Doing Business as Clark Bros.; Coast Side Transportation Company, a Corporation; Frank De Marco, Doing Business as Frank De Marco Draying Co.; Dante Dianda, Doing Business as Half Moon Bay Draying Company; Highway Transport Co., a Corporation; Oakland San Jose Transportation Co., a Corporation; R. W. Rasmussen Co., Inc., a Corporation; San Francisco & San Jose Fruit & Produce Transfer Co., a Corporation; Antone Schivo, Joseph Schivo, and Peter Carcione, as Copartners, Doing Business Under the Name and Style of S. & G. Transfer Co.; Angelo Villanti, Doing Business as City Auto Drayage Co.; Alfred G. Witt, Doing Business as Al. G. Witt, and Kiso Yasunaga, Doing Business as Produce Transfer Co., Plaintiffs,

vs.

RAY L. RILEY, as State Controller of the State of California, Defendant

Action in Equity for Injunction to Restrain Collection of Highway Tax

BILL OF COMPLAINT—Filed July 21, 1928

Plaintiffs complain of defendant and for cause of action allege:

I

That at all times herein mentioned the legal status of each of the plaintiffs was and is as follows; that plaintiff, Bekins Van Lines, Inc., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business [fol. 2] located in the City of Los Angeles, in the Southern

District of the said State of California; that plaintiff, Chew Chick was and is a citizen of the United States and a resident of Menlo Park in said Northern District of California, doing business, and sole proprietor of Bay City Hauling Co.; that plaintiff, Kenneth C. Clark, was and is a citizen of the United States and a resident of the City of Watsonville in said Northern District of California, that plaintiff Andrew B. Clark, was and is a citizen of the United States and a resident of the City of Watsonville in said Northern District of California, and that the two last named plaintiffs were and are copartners transacting business under the firm name and style of Clark Bros.; that plaintiff, Coast Side Transportation Company, was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City and County of San Francisco, in said Northern District of California; that plaintiff, Frank De Marco was and is a citizen of the United States and a resident of the city of San Jose, in said Northern District of California, doing business as, and sole proprietor of Frank De Marco Draying Co.; that plaintiff, Dante Dianda, was and is a citizen of the United States and a resident of the City and County of San Francisco, in said Northern District of California, doing business as and the sole proprietor of Half Moon Bay Draying Company; that plaintiff, Highway Transport Co., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its [fol. 3] principal place of business located in the City of San Jose, in said Northern District of California; that plaintiff; Oakland San Jose Transportation Co., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the city of Oakland, in said Northern District of California; that plaintiff R. W. Rasmussen Co., Inc., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Oakland, in said Northern District of California; that plaintiff San Francisco & San Jose Fruit & Produce Transfer Co., was and is a corporation duly organized and existing under and by virtue of the

laws of the State of California, with its principal place of business located in the City and County of San Francisco, in said Northern District of California; that plaintiffs Antone Schivo and Joseph Schivo were and are citizens of the United States and residents of the city and County of San Francisco in said Northern District of California, that plaintiff, Peter Carcione, was and is a citizen of the United States and a resident of the City and County of San Francisco, in said Northern District of California, and that said three last named plaintiffs were and are copartners transacting business under the firm name and style of S. & G. Transfer Co.; that plaintiff, Angelo Villanti, was and is a citizen and subject of the kingdom of Italy and resident of the City and County of San Francisco, in said Northern District of California, doing business as, and the sole proprietor of City Auto Drayage Co.; that plaintiff Alfred G. Witt, was and is a citizen of the United States and a resident of the City and County of [fol. 4] San Francsco, in said Northern District of California, doing business as Al G. Witt; that plaintiff Kiso Yasunaga was and is a citizen and subject of the Empire of Japan and a resident of San Jose, in said Northern District of California, doing business as, and sole proprietor of Produce Transfer Co.

II

That at and during all the times herein mentioned each of the plaintiffs herein was and is and has been classed by the State Railroad Commission and the State Board of Equalization, respectively, of the State of California, as a common carrier transporting freight or property exclusively, over public highways in said state between fixed termini or over regular routes, for hires and as such classified common carrier each of them holds, and was and is operating over said public highways by virtue of, a certificate of public convenience and necessity issued by said State Railroad Commission, and as such classified common carrier each of said plaintiffs is subject to the operative limitations prescribed by the laws of said state and the rules and regulations of said Railroad Commission made in pursuance thereof, and particularly the Act of

May 10, 1917, being Chapter 213 of the 1917 Statutes of California entitled, "An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway, by automobile, jitney, busses, autotrucks, stages and auto stages, etc.," and the Acts amendatory thereof.

[fol. 5] III

That at and during all of the times herein mentioned the defendant, Ray L. Riley, was and is a citizen of the United States and a resident of the City of Sacramento in said Northern District of California, and the duly elected, qualified and acting Controller of the State of California, and as such State Controller he was and is authorized, empowered and directed under the laws of said State to collect the highway taxes hereinafter mentioned, assessed and levied by the State Board of Equalization of said state to and against each of the plaintiffs herein.

IV

That on the 2nd day of November, 1926, there was adopted by the people of the State of California, at a general election held on said date, an amendment to the constitution of said state known and designated as Assembly Constitutional Amendment No. 37, proposed by the legislature of said state, filed in the office of the Secretary of State of California on the 27th day of April, 1925, and contained in Chapter 60, 1925 Statutes of California, and page lxxxviii, Statutes of 1927 of said state, identified as and becoming Section 15 of Article XIII of the Constitution of said State.

V

That said Section 15, Article XIII of said constitution among other things provides that the taxes levied, assessed and collected as therein provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state be-

[fol. 6] tween fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner therein provided; and that the word "companies" as used in said section shall include persons, partnerships, joint stock associations, companies and corporations; and that companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, car, equipment, and other property, or any part thereof, used exclusively in the operation of their business in said state, equal to four and one quarter per cent of the gross receipts from operations of such companies, and each thereof, within said State; and that all such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within said State; and that said Section 15 of Article XIII is hereby specially referred to and made part of this bill of complaint as fully as if set forth herein; and that each of the plaintiffs herein is and all of them are, as classified common carriers of freight or property for compensation between fixed termini or over [fol. 7] regular routes over the said public highways, subject to assessment and levy of said highway tax of (5%) five per centum of their gross annual receipts.

VI

That is order to carry into effect and to fully enforce the said constitutional amendment the legislature of said state duly passed an act at the 1927 session thereof entitled: "An act to add three new sections to the Political Code to be numbered three thousand six hundred sixty-four

aa, three thousand six hundred seventy bb and three thousand six hundred seventy cc, relating to taxation of highway transportation companies for state purposes," which act was duly approved by the Governor of said state on the 5th day of March, 1927, and went into effect immediately; said act being Chapter 19 of the 1927 Statutes of California, and which act is hereby specially referred to and made part of this bill of complaint as fully as if set forth herein.

VII

That said constitutional amendment and the said act, provide, among other things, that the taxes to be assesed, levied and collected as therein provided shall be entirely and exclusively for highway purposes; that said taxes shall be assessed and levied by the Board of Equalization of California and shall be collected by the State Controller; that said taxes shall be in lieu of all other taxes and licenses, state, county and municipal upon the property of the common carriers hereinbefore described used exclusively in the operation of their transportation business in said state; provided that nothing therein shall be construed to release such common carrier from the payment of any amount re- [fol. 8] quired to be paid for any special privilege or franchise theretofore granted by any of the municipal authorities of said state; that revenues derived from said taxes shall be deposited in the general fund of said state; that one-half thereof are appropriated and set aside to said state to be devoted exclusively to the maintenance and repair of public highways within the State and that the remaining one-half thereof shall be apportioned among and distributed to the respective fifty-eight counties of said state in the proportion that the number of motor vehicles registered within each county for the proceding calendar year bears to the total number of motor vehicles registered in said state, and the sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within said counties; that the gross receipts upon which said taxes shall be computed shall be the gross receipts for the calendar year preceding the year in which said assessment and levy are made and that said taxes shall become a lien on all of the property covered by said tax on the first

Monday in March of each year after the adoption of said constitutional amendment and shall become due and payable annually on the first Monday in July thereafter; that certain enumerated sections of the Political Code of said state already in effect shall apply and be construed to apply to all common carriers subject to said tax, with the same force and effect as if said common carriers were therein expressly mentioned.

VIII

That said highway taxes provided for by said constitutional amendment are assessed and levied against, and the collection of said tax is limited to, only common carriers transporting persons or property for compensation over [fol. 9] any public highway in the state between fixed termini, or over a regular route, excluding school busses when operated by school districts, and are not intended to apply and do not apply and have not been applied to common carriers not operating over fixed termini or over a regular route, transporting persons or property for compensation over any public highway in the state, nor to exclusive contract or private carriers operating for compensation over the same highways, nor to any other class of carriers using said highways; and that such common carriers not operating over fixed termini or over regular routes and such contract or private carriers and all other classes of carriers using said highways are entirely excluded from the payment of said highway taxes and pay no state taxes other than a corporate franchise tax assessed on the basis of the full cash value of such corporate franchise, if they be corporations, but not otherwise, license taxes hereinafter more particularly mentioned, and in addition thereto local, county and municipal taxes hereinafter more particularly mentioned.

IX

That the major portion of the transportation business of most of plaintiffs herein is limited to the transportation of farm products consisting of fruits and vegetables, mostly perishable, grown in the Santa Clara, Watsonville, Pajaro, Salinas and adjacent valleys situated south of San Francisco Bay, to the San Francisco fruit and produce commis-

sion market; that because of the nature of the commodities transported and the necessity for rapid transit said commodities are picked up and loaded on the farms, ranches and orchards where produced and carried into the San Francisco market over the public highways usually between [fol. 10] sunset and sunrise to the great advantage and convenience of producer, middleman and consumer and is a service that could not be so rendered by any other existing form of carrier; that the busiest season of the year for plaintiffs and all other common and contract or private carriers operating within said state over the public highways, commences in the late spring and ends in the early fall; that principally during said season of the year and also in a less degree at other times, a large number of motor vehicle common carriers and contract or private carriers, to the extent of at least five hundred operators transporting property for hire over the public highways in California, that do not come within the definition of the common carriers taxed under said constitutional amendment and said act, enter into direct and keen competition with the various plaintiffs herein in the transporting of commodities or property over the public highways of said state; that said common and contract or private carriers not subject to said highway tax are also not subject to regulations as to routes, termini, period of operation, or in any other respect by the State Railroad Commission or any other public state authority, and are not required and do not pay an average annual total of local, municipal, county and state taxes and licenses, excepting none, and of every kind combined, in excess of twenty-five per centum (25%) or one-fourth (¼) of the amount of the gross receipts or highway tax required to be paid annually by the respective plaintiffs herein where said plaintiffs and the said excluded or non-taxable carriers each use exclusively in said business over the same routes and in direct competition under like conditions, a total taxable operative property of equal full cash or assessable value; that the same average difference between all combined taxes and licenses of every kind as aforesaid required to be paid [fol. 11] by all carriers not subject to said highway tax and common carriers subject to said highway tax operating over competitive routes, with taxable operative property of

equal full cash or assessed value, prevails throughout the State of California, namely, that said common carriers operating in California subject to said highway tax are thereby assessed and obligated to pay an average of four times the amount of taxes, notwithstanding their exemptions from all other kinds of taxes, that all other highway carriers for compensation not subject to said tax are assessed and obligated to pay for all local municipal, county and state taxes and licenses of every kind combined; that the average full cash value of operative property, that is to say, of all property used exclusively in said business of carrier, of all common carriers and of all private or contract carriers that operate over the public highways of California carrying property for compensation is not in excess of one-fourth (¼) or twenty-five per centum (25%) of the average annual gross receipts derived from such business by said carriers.

X

That the average total annual rate or percentage of taxes that carriers not subject to said highway tax operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind combined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to plaintiffs herein on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced.

[fol. 12]

XI

That said gross receipts tax is purely and solely a tax for highway purposes apportioned between the state and the various counties of the state of California to be devoted exclusively to the maintenance and repair of public highways; that the aforesaid competitiors of plaintiffs operating as contract or private carriers and common carriers of property for hire over the said public highways not subject to said tax use the said public highways in the same manner, to the same degree, with same type of ve-

hicles, employ the same methods of operation and have the same source of receipts as the plaintiffs and are in direct and keen competition with plaintiffs; and that said tax is therefore arbitrary, oppressive, unjust, unlawful, illegal, discriminatory and burdensome, and is not justified by reason of any difference in the source of receipts or in the situation or character of the property employed by the common carriers subject to the tax and by those carriers for hire not subject to the tax, and it is therefore class legislation and denies to the plaintiffs the equal protection of the laws in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States.

XII

That the common carriers subject to said tax are subject to control by said Railroad Commission as to termini and routes, kind of transportation carried, class of vehicles used, term or period of operation and other similar regulations while said competitive common carriers and contract or private carriers not subject to said tax using said public highways for hire are free from said limitations, restrictions and regulations, thus affording the latter classes of carriers freedom of action with respect to choice of business, routes, seasonal operations and all other regulations [fol. 13] enforced by said State Railroad Commission against plaintiffs, which liberty of action said classes of carriers do now freely exercise, and which the plaintiffs herein do not possess and do not and cannot exercise, and the said non-taxable classes of carriers for hire are permitted to and do use and enjoy, and derive their income exclusively from the use and enjoyment of said public highways without paying any part or portion of the said highway tax or without contributing in any manner toward the maintenance or repair of said public highways beyond what all owners and operators of motor vehicles that do not enjoy or use said public highways as carriers for hire contribute toward their maintenance and repair, to the unfair and great injury and damage of plaintiffs and which will, if allowed to continue, amount to a confiscation of the property and business of the plaintiffs and render plaintiffs insolvent; and that said highway tax is thereby made a double burden on the free and equal competition of plain-

tiffs with said carriers for hire not subject to said tax and is an unlawful, void and illegal tax and unjustly discriminates against plaintiffs thereby denying to the plaintiffs the equal protection of the laws in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

XIII

That betwe-n the first Monday in March, 1928, and the third Monday before the first Monday in July, 1928, the State Board of Equalization of California, in the manner provided by law, assessed and levied against each of the plaintiffs herein the aforesaid highway tax of five per centum (5%) of the gross receipts derived from operations by each of them during the preceding year, said tax being [fol. 14] for and covering the fiscal year beginning July 1, 1928, and ending June 30, 1929, in the respective amounts as follows, to wit: Bekins Van Lines, Inc., a corporation, $11,780.38; Chew Chick doing business as Bay City Hauling Co., $502.88; Kenneth C. Clark and Andrew B. Clark as copartners transacting business under the firm name and style of Clark Bros., $5688.84; Coast Side Transportation Company, a corporation, $2,137.92; Frank De Marco doing business as Frank De Marco Draying Co., $1500.00; Dante Dianda doing business as Half Moon Bay Draying Company, $459.36; Highway Transport Company, a corporation, $7371.90; Oakland San Jose Transportation Co., a corporation, $2,609.26; R. W. Rasmussen Co., Inc. a corporation, $3,208.54; San Francisco & San Jose Fruit & Produce Transfer Co., a corporation, $1,315.70; Antone Schivo, Joseph Schivo and Peter Carcione as copartners transacting business under the firm name and style of S. & G. Transfer Co., $669.68; Angelo Villanti doing business as City Auto Drayage Co., $221.76; Alfred G. Witt doing business as Al G. Witt, $881.06 and Kiso Yasunaga doing business as Produce Transfer Co., $2,127.32, and that thereafter and prior to the commencement of this action in equity the said defendant Ray L. Riley, as Controller of the State of California, acting under authority vested in him by the laws of said state, notified the plaintiffs and each of them that unless they paid, prior to the second day of July, 1928, the aforesaid taxes so assessed and levied, that

he would under the said authority vested in him, seize and sell at public auction a sufficient amount of the property of plaintiffs to pay said taxes with penalties and costs accruing.

[fol. 15]

XIV

That none of the plaintiffs has paid the aforesaid tax or any part thereof and that they have refused to pay same because they verily and conscientiously believe and have been advised and therefore allege that said tax is an unjust and illegal discrimination against them and that Section 15, Article XIII of the Constitution of California and the said Statute enacted to carry same in effect are violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are therefore void and illegal and that the assessment, levy and attempt and threat to enforce the payment of said tax are all unlawful, void and illegal; that said defendant ever since the second day of July, 1928, has threatened, and does now continue to threaten, to seize the property and equipment of the plaintiffs and to sell the same at public auction in order to realize a sum sufficient to pay the aforesaid taxes with penalties and costs and will do so unless immediately enjoined and restrained.

XV

That plaintiffs have no plain, speedy and adequate or complete remedy at law, and unless defendant is immediately enjoined and restr-ined from seizing and selling the property of plaintiffs to enforce the collection of said taxes the plaintiffs will suffer irreparable injury and damage and will be deprived of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to said Constitution of the United States in manner following, to wit:

XVI

That the plaintiffs are afforded the right by statute to pay said taxes under protest on the ground of illegality and to thereafter bring suit against the Treasurer of the [fol. 16] State of California for the recovery of such taxes; that no provision is made for the payment of interest on

such taxes paid under protest during the pendency of such suit; that no provision is made by law for the payment of any judgment so recovered; that such judgment cannot be collected by execution against the state or its property or by any of the ordinary processes of law provided for the enforcement of judgments; that no provision for the payment of such judgment so recovered can be made except by specific and separate appropriation and legislation by the legislature of said state in such manner and at such time as it sees fit and that it may at its pleasure refuse to do so; that said taxes are required to be paid into the general fund of said state and within three months thereafter one-half the amount of said collected taxes is required to be apportioned and distributed among the fifty-eight counties of said state; that said taxes could not therefore be traced and refunded by said state treasurer if he had the legal authority to do so in satisfaction of any judgment so recovered; that to recover the one-half of said taxes paid to said counties the plaintiffs would be obliged to institute separate and distinct suits against said counties thereby causing a multiplicity of suits; that the integrity and success of the business of plaintiffs depends upon a continuity of service and that if said property of plaintiffs is seized and sold at public auction by said defendant, plaintiffs will be deprived of the opportunity to transact business therewith and their routes, patronage and business will be thereby wholly disrupted, destroyed and lost beyong recovery or rehabilitation; that no relief or satisfaction in damages could be obtained against said defendant to compensate plaintiffs for the loss of their property, routes, [fol. 17] patronage and business, and it would be extremely difficult to compute or estimate the amount of such damages; that if said taxes are not paid on or before the sixth Monday after the first Monday in July, 1928, one-half the amount thereof is subject to a penalty equal to fifteen per centum (15%) of the amount thereof and will be added thereto, and an additional penalty of five per centum (5%) will be added to the amount remaining unpaid on the first Monday in February, 1929; that if said taxes are not paid on or before the Saturday preceding the first Monday in March, 1929, the plaintiffs herein that are corporations will have their respective corporate rights, powers and priv-

ileges suspended and thereafter will be incapable of exercising the same.

XVII.

That the amount of tax fairly and equitably due from each of the plaintiffs herein is twenty-five per centum (25%) of the respective amounts assessed, levied and attempted to be collected from each of said plaintiffs herein as hereinbefore alleged; and that said plaintiffs are ready, willing and able, and each of them does hereby offer to pay into court a fair, just and non-discriminatory tax in the premises which plaintiffs allege to be said twenty-five per centum (25%) of said respective annual gross receipts taxes, upon the granting of an injunction herein.

Wherefore plaintiffs pray for a judgment and decree of this Honorable Court enjoining and restraining the said defendant Ray L Riley as Controller of the State of California, his agents, deputies or assistants during the pendency of this action and until further order of the Court, [fol. 18] from taking any steps, action or proceedings of any kind or nature to enforce or compel the plaintiffs or any of them to pay or discharge the highway tax or any part thereof, mentioned and described in the bill of complaint herein and as assessed and levied under said Article XIII, Section 15 of the Constitution of the State of California and the said statute enacted to carry same into effect; that on final hearing or trial of this action said constitutional amendment and said statute giving efficacy thereto be declared in violation of the Fourteenth Amendment of the Constitution of the United States and null and void and of no force and effect and that said defendant be perpetually enjoined and restrained from collecting said taxes or any portion thereof from plaintiffs; for their costs and disbursements of suit and for general relief in equity, and that subpœn-s issue accordingly.

Samuel T. Bush, Attorney and Solicitor for Plaintiffs.

[fols. 19 & 20] *Duly sworn to by Alfred G. Witt. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—Filed July 21, 1928

To Ray L. Riley, as State Controller, defendant above named, and to the Hon. C. C. Young, as Governor of the State of California, and to U. S. Webb, Esq., as Attorney General of said State:

You and each of you will please take notice that the above named plaintiffs will make an application or motion for an order granting said plaintiffs an interlocutory or temporary injunction, pending the hearing and final determination of the above entitled cause, before two District Judges and one Circuit Judge, sitting en banc, in the court room of said Court at the United States Courthouse and Postoffice Building, corner Seventh and Mission Streets in the City and County of San Francisco, in said District, on Monday, July 30, 1928, at ten o'clock A. M., of said day, or as soon thereafter as counsel may be heard, enjoining and restraining the said defendant, his agents, deputies or assistants, from taking any steps, action or proceedings of any kind or nature to enforce or compel plaintiffs or any of them to pay or discharge the highway taxes mentioned and described in the bill of complaint on file in said Court, a copy of which bill of complaint, together with Plaintiffs' Points and Authorities, is hereto attached and served herewith.

Said motion will be made on the ground that said tax is discriminatory and not assessed or levied against common [fol. 22] carriers not operating over fixed termini or a regular route, and is not assessed or levied against private carriers, that carry property for compensation over the public highways of California, and that such excluded carriers do not pay an equivalent in other taxes, or any highway tax; and that the assessment, levy and collection of said tax is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States as more particularly appears in the copy of the verified bill of complaint hereto attached and made part of this notice of motion.

Said motion will be based on the said verified bill of complaint on file herein, and on such testimony of witnesses

taken orally in open court, as may be required and on the entire papers on file herein, including this notice of motion.

Samuel T. Bush, Attorney and Solicitor for Plaintiffs.

Dated July 20, 1928.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

ADMISSION OF SERVICE OF NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION, ETC.—Filed July 23, 1928

We hereby admit due service of Notice of Motion by Plaintiffs for Interlocutory Injunction in the above entitled cause, and receipt of a copy of (1) Bill of Complaint, (2) said Notice of Motion and (3) Plaintiffs' Points and Authorities therein.

C. C. Young, Governor of the State of California.
U. S. Webb, Attorney General of the State of California.

Dated July 21, 1928.

(Endorsed:) Receipt of copy of the within Admission of Service of Notice of Motion acknowledged this 21st day of July, 1928. U. S. Webb, Attorney for Defendant. Frank L. Guerena, Deputy.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

OPPOSITION TO APPLICATION FOR INTERLOCUTORY INJUNCTION —Filed July 28, 1928

To the Honorable the Judges of the United States Circuit Court of Appeals and to the Judges of the District Court of the United States in and for the Southern Division of the Northern District of California:

Now comes Ray L. Riley, as State Controller of the State of California, the defendant named in the above entitled proceeding, and opposes the application herein made by the above named complainants for an interlocutory injunction on the following grounds:

I

That the bill of complaint on file herein does not show that the complainants will suffer any irreparable injury and damage as a consequence of the performance of any or all of the acts sought to be enjoined.

II

That the granting of the interlocutory injunction applied for will seriously injure and embarrass the State of California in the administration of its revenue laws and in the conduct of its governmental affairs.

III

That the assessments and levies against the complainants are valid.

[fol. 25]

IV

That Section 15 of Article XIII of the Constitution of California is not contrary to the Fourteenth Amendment or to any provision of the Constitution of the United States in that its terms apply only to companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in California between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district.

This opposition is made and is based upon complainants bill of complaint, upon the motion to dismiss filed by defendant herein, upon notice of said motion, upon the points and authorities filed in conjunction with said motion and upon all of the papers and records on file herein.

Wherefore defendant prays that complainants, and each of them, be denied the whole and every part of the relief sought by their bill.

Ray L. Riley, Defendant Above Named. U. S. Webb, Attorney General of the State of California; Frank L. Guerena, Deputy Attorney General, Attorneys for said Defendant.

[fol. 26] Receipt of the copy of the within Opposition to Application for Injunction is hereby acknowledged this 28th day of July, 1928.

—— ——, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 27] In United States District Court

Motion to Dismiss Bill of Complaint

Now comes Ray L. Riley, as State Controller of the State or California, named as defendant in the above entitled proceeding and moves the above entitled court to dismiss the bill of complaint filed herein on the following grounds:

I

That said bill of complaint does not state facts sufficient to constitute a cause of action against said defendant, or to entitle complainants, or any of them, to the whole or any part of the relief prayed for in said bill.

II

That this court has no jurisdiction of the subject of this proceeding, or of the above named defendant, or of the State of California.

III

That there is a defect of parties plaintiff in that the several plaintiffs are not properly joined.

IV

That there is a misjoinder of parties plaintiff in that the plaintiffs are not properly joined.

V

That several alleged causes of action have been improperly united.

This motion is also based upon the said bill of complaint, the notice of motion and upon all of the papers and records [fols. 28-32] on file in the above entitled proceeding.

Dated July 27, 1928.

U. S. Webb, Attorney General of the State of California; Frank L. Guerena, Deputy Attorney General, Attorneys for Defendant, Ray L. Riley, as State Controller of the State of California.

[fols. 33 & 34] In United States District Court

[Title omitted]

Amended Order and Decree Refusing Plaintiffs' Motion for an Interlocutory Injunction and Granting Defendant's Motion to Dismiss—Filed Aug. 10, 1928

By the Court:

Plaintiffs' motion for an interlocutory injunction and defendant's motion to dismiss, respectively, came on regularly to be heard on the 30th day of July, 1928, at this term, before Wm. H. Hunt, Circuit Judge and A. F. St. Sure and Frank H. Kerrigan, District Judges, and were argued by respective counsel for plaintiffs and defendant; and thereupon, on consideration thereof, it was ordered, adjudged and decreed and this Court does hereby order, adjudge and decree, as follows, towit:

That plaintiffs' motion for an interlocutory injunction be, and the same is hereby denied and that defendant's motion to dismiss be, and the same is hereby granted.

W. H. Hunt, Circuit Judge. A. F. St. Sure, D. J. Frank H. Kerrigan, D. J.

Dated July 31, 1928.

[File endorsement omitted.]

[fol. 35] In United States District Court

Order Allowing Appeal and Fixing Bond—Filed Sept. 8, 1928

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed. It is further ordered that the bond on appeal be fixed at the sum of three hundred ($300) dollars, the same to act as a bond for costs and damages on appeal.

Done in open court this 8th day of September, 1928.

A. F. St. Sure, U. S. District Judge and one of the judges presiding in the above-entitled cause.

[File endorsement omitted.]

[fol. 36] In United States District Court

Assignment of Errors—Filed Sept. 8, 1928

Now come the plaintiffs above named and file the following assignment of errors upon which they and each of them will rely in the prosecution of their appeal in the above entitled cause from the order and decree made by this Honorable Court, and filed and entered on the 10th day of August, 1928, in the above entitled cause:

The said United States District Court erred in making the order and decree refusing the interlocutory injunction prayed for by the plaintiffs herein and in granting defendant's motion to dismiss the bill of complaint in this cause, for the following reasons, towit:

I

That said Court erred in holding and deciding that plaintiffs' bill of complaint does not state facts sufficient to constitute a cause of action against the defendant herein or to entitle plaintiffs or any of them to the whole or any part of the relief prayed for in said bill.

II

That said Court erred in holding and deciding that it had no jurisdiction of the subject of the proceedings or of the above named defendant or of the State of California.

III

That said Court erred in holding and deciding that there is a defect of parties plaintiff in that the several plaintiffs are not properly joined.

[fol. 37]

IV

That said Court erred in holding and deciding that there is a misjoinder of parties plaintiff in that the said plaintiffs are not properly joined.

V

That said Court erred in holding and deciding that several alleged causes of action have been improperly united.

VI

That said Court erred in holding and deciding that the plaintiffs' bill of complaint on file herein does not show that the plaintiffs will suffer any irreparable injury and damage as a consequence of the performance of any or all of the acts sought to be enjoined.

VII

That said Court erred in holding and deciding that the granting of the interlocutory injunction applied for will seriously injure and embarrass the State of California in the administration of its revenue laws and in the conduct of its governmental affairs.

VIII

That said Court erred in holding and deciding that the assessments and levies against the plaintiffs are valid.

IX

That said Court erred in holding and deciding that Section 15 of Article XIII of the Constitution of the California is not contrary to the Fourteenth Amendment or any provision of the Constitution of the United States.

[fol. 38]

X

That said Court erred in holding and deciding that Section 15 of Article XIII of the Constitution of the State of California and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of said state constitution and said statute enacted to carry same into effect apply only to common carriers operating for compensation between fixed termini or over regular routes over the public highways of said State of California, and do not apply to all other classes of common carriers and to private or contract carriers using the said public highways under like conditions and in competition with the plaintiffs herein.

XI

That said Court erred in holding and deciding that Section 15 of article XIII of the Constitution of the State of California, and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of the constitution of said state and said statutes enacted to carry same into effect provide that and require the plaintiffs to pay in taxes a sum equal to an average of four times the amount of local, county, municipal and state taxes and licenses of all kind combined exacted from and required to be paid by their competitior carriers excluded from the aforesaid constitutional and statutory classification and using said public highways as such carriers under like con-
[fol. 39] ditions, in competition with the plaintiffs herein.

XII

That said Court erred in holding and deciding that the five per centum gross receipts highway tax provided for in said section of the said state constitution and in said Chapter 19 of the 1927 Statutes of California and the assessment and levy thereof made against the plaintiffs

herein, and the attempt to enforce the collection thereof against said plaintiffs and their property are not a double or discriminatory burden on the free and equal competition of the plaintiffs herein with all classes of carriers for compensation not subject to said tax and using the said public highways in competition with said plaintiffs.

XIII

That said Court erred in holding and deciding that the plaintiffs have a plain, speedy and adequate or complete remedy at law.

XIV

That said Court erred in holding and deciding that the enforcement of said state constitutional amendment and the aforesaid statute enacted to carry same into effect and the collection of said tax would not deprive plaintiffs of their property without due process of law.

Wherefore the said plaintiffs and appellants pray that the order and decree of this Court may be reversed and that said defendant be perpetually enjoined and restrained from collecting any taxes under the provisions of the said section of the state constitution of California and of any [fols. 40-48½] statutes enacted to carry same into effect and for such other and further disposition to be made in the premises as may be in accordance with law and the statutes of the United States in such cases made and provided.

Samuel T. Bush, Solicitor for Plaintiffs and Appellants.

[File endorsement omitted.]

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS RELIED ON AND PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed Nov. 13, 1928.

To Charles Elmore Cropley, Esq., Clerk of the above-entitled Court:

The appellants herein hereby designate the points upon which they will rely in the prosecution and presentation of their appeal in this cause, as follows, towit:

Said appellants rely on each and all of the points specifically mentioned and set forth in Paragraphs I, II, II, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of Appellants' Assignment of Errors on file herein.

Said points are grouped into three major points as follows:

(1) That the bill of complaint states a cause of action for equitable relief.

(2) That the United States District Court had jurisdiction of the parties and of the subject of the proceedings.

(3) That Section 15, Article XIII of Constitution of [fol. 50] California and Chapter 19 of the 1927 Statutes of California enacted to carry into effect said Section 15 of Article XIII are discriminatory, arbitrary, oppressive and illegal and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deny to appellants the equal protection of the laws and deprive appellants of their property without due process of law.

The parts of the record which the appellants deem necessary for the consideration of the foregoing points are:

(a) Plaintiffs verified bill of complaint,

(b) Notice of Motion for Interlocutory Injunction,

(c) Admission of service of Notice of Motion for Interlocutory Injunction by Honorable C. C. Young, Governor, and U. S. Webb, Attorney General of the State of California,

(d) Defendant's opposition to Motion for Interlocutory Injunction,

(e) Defendant's Motion to Dismiss plaintiffs' bill of complaint,

(f) Assignment of Errors.

Respectfully submitted.

William Sea, Jr., Solicitor for Appellants.

Dated this 8th day of November, 1928.

[fol 51] Receipt of Copy within Statement of Points Relied On, etc., together with copy of Præcipe of Appearance of Wm. Sea, Jr., acknowledged this 8th day of November, 1928.

W. S. Webb, Attorney General, Attorney for Appellee.

[fol. 52] [Filed endorsement omitted.]

Endorsed on cover: File No. 33,839. N. California D. C. U. S. Term No. 530. Bekins Van Lines, Inc., Chew Chick, doing business as Bay City Hauling Co.; Kenneth C. Clark, et al., etc., et al., appellants, vs. Ray L. Riley, as State Controller of the State of California. Filed November 5th, 1928. File No. 33,839.

(3035)

FILE COPY

FILED
DEC 3 1928
CHARLES ELMORE CROPL
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1928

No. 13

BEKINS VAN LINES, INC.
(a corporation), et al.,
Appellants,

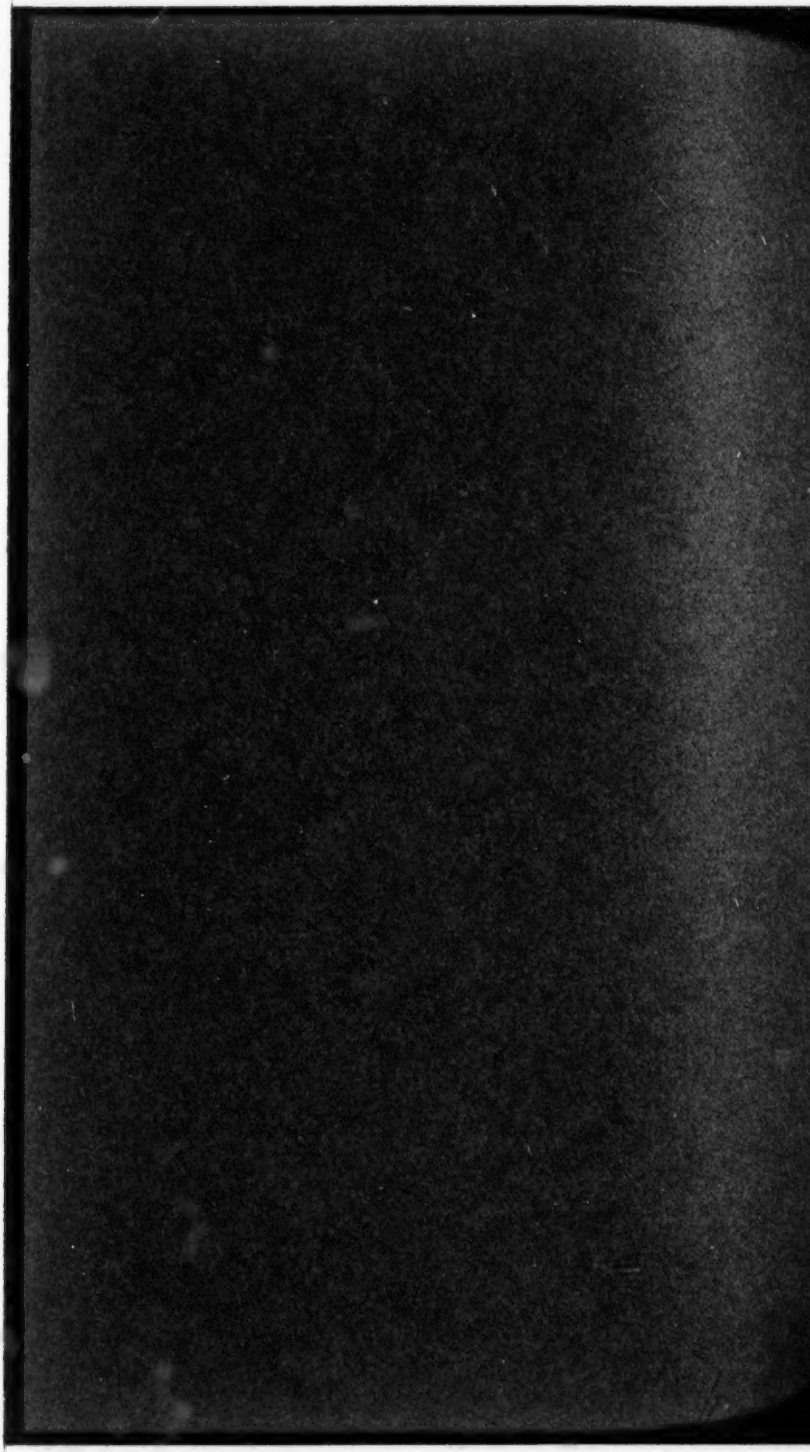
vs.

RAY L. RILEY, as State Controller of California,
Appellee.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW ON APPEAL.

SAMUEL T. BUSH,
WILLIAM SIBS, JR.,
Standard Oil Building, San Francisco,
Solicitors for Appellants.

Sunset-Walker Stationery Co., San Francisco



Subject Index

	Page
Statement disclosing basis of jurisdiction	1
Statutory provisions sustaining jurisdiction	2
Date of decree and date of appeal	3
Nature of case and rulings below	3
Cases sustaining jurisdiction to review on appeal	11

Table of Cases and Statutes Cited

	Pages
Binderup v. Pathe Exchange, 263 U. S. 291, etc.	11
Clark v. Poor, 274 U. S. 554, etc.	12
Home Telep. & Teleg. Co. v. Los Angeles, 227 U. S. 278, etc.	11
Hopkins v. Southern Calif. Tel. Co., 72 L. Ed. 178, etc.	11
Interstate Busses Corporation v. Blodgett, 72 L. Ed. 243, etc.	11
Judicial Code, Section 238	2, 11
Judicial Code, Section 266	2, 11
Raymond v. Chicago Union Traction Co., 207 U. S. 20, etc.	11
Smith v. Wilson, 273 U. S. 388, etc.	12
Statutes of California, 1927, Chapter 19	3
Statutes of California, 1925, Chapter 60	4
U. S. Code Anno., Sec. 345, Title 28	2, 11
U. S. Code Anno., Sec. 380, Title 28	2, 11
U. S. Constitution, 14th Amendment	8, 10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 530

BEKINS VAN LINES, INC. (a corporation), et al.,
Appellants,
vs.
RAY L. RILEY, as State Controller of California,
Appellee.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW ON APPEAL.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

This is an appeal from an order or decree made and entered by the District Court of the United States in and for the Southern Division of the Northern District of California, wherein the appellants herein were denied their motion for an interlocutory

injunction and the motion of the appellee to dismiss the bill was granted. Both motions came on to be heard at the same time; they were argued and submitted together and were decided by the Court, three judges sitting during the proceedings, in one order or decree. (Minute Order Submitting Motions, Cl. Tr. p. 30. Order and Decree Refusing Plaintiffs' Motion for an Interlocutory Injunction and Granting Defendant's Motion to Dismiss, Cl. Tr. p. 33.)

No opinion was rendered or filed by the District Court.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The proceedings were instituted under the provisions of Section 266 of the Judicial Code, Section 380 U. S. C. A., Title 28, and the appeal to this Court is prosecuted under the same statute and under Section 238 of the Judicial Code, Section 345 U. S. C. A., Title 28.

Appellants' motion for an interlocutory injunction was based upon their *verified* bill of complaint. (Cl. Tr. pp. 1 to 17.) A notice of motion and order to show cause were served upon the appellee more than five days before the date of hearing. (Order to Show Cause, Cl. Tr. p. 20. Notice of Motion for Interlocutory Injunction, Cl. Tr. pp. 21, 22.)

The Governor and Attorney General of California were respectively duly and regularly served with copies of the bill of complaint and of notice of motion on July 21, 1928, which was nine days before the date of hearing thereof. (Cl. Tr. p. 23.) The motions of

the respective parties were heard and submitted on July 30, 1928. (Minute Order, Cl. Tr. p. 30.)

DATE OF THE DECREE AND DATE OF APPEAL.

The order or decree denying the motion for an interlocutory injunction and granting the motion to dismiss was made on July 31, 1928. (Minute Order, Cl. Tr. p. 31; Order and Decree, Cl. Tr. p. 33.) The decree was filed and entered August 10, 1928. (Cl. Tr. p. 33.) Application for appeal was presented and order allowing appeal was made and filed on September 8, 1928. (Cl. Tr. pp. 34, 35.)

NATURE OF THE CASE AND RULINGS BELOW.

Since no opinion was rendered or filed by the Court below the nature of the case is stated with some detail.

The appellants sought by their bill of complaint to enjoin the appellee, Ray L. Riley, as State Controller of California, from enforcing the collection of an annual 5% gross receipts highway tax assessed and levied against the appellants as common carriers *operating between fixed termini or over regular routes* upon the public highways of the state for compensation, said State Controller being authorized and directed under the laws of California to collect said taxes. (Bill of Complaint, paragraphs II, III, Cl. Tr. pp. 4, 5.)

The tax in question was established by Chapter 19 of the 1927 Statutes of California. It finds its

authority in an amendment to the State Constitution enacted by the Legislature of the state, Chapter 60, California Statutes of 1925, and approved by the people of the state at a general election held on November 2, 1926. (Bill of Complaint, paragraphs IV and V, Cl. Tr. pp. 5, 6.)

On the hearing in the Court below the only point upon which the Court desired or heard argument was the reasonableness of the classification. As previously stated, no opinion was rendered or filed by the Court, comprised of Circuit Judge Hunt and District Judges St. Sure and Kerrigan, in deciding the motions.

In order to further show that the nature of the case and the rulings below were such as to bring the cause within the jurisdictional provisions relied on a recital of some of the admitted facts set forth in the verified bill of complaint is in order.

The complainants are all classified as common carriers of freight or property for compensation, between fixed termini or over regular routes using the public highways and, as such, subject to the assessment and levy of the said highway tax of five per cent of their gross annual receipts. (Bill of Complaint, paragraph V, Cl. Tr. pp. 5, 6.)

The said constitutional amendment, and the said statute enacted to carry same into effect, provide that said taxes shall be entirely and exclusively for highway purposes, to be assessed and levied by the Board of Equalization of California and collected by the State Controller, and that said taxes shall be in lieu of all other taxes and licenses, state, county and

municipal, upon the property of the common carriers aforesaid used exclusively in the operation of their transportation business in said state, and that one-half of said taxes so collected shall be devoted exclusively to the maintenance and repair of public highways within the state, and the remaining one-half thereof shall be apportioned among the fifty-eight counties of said state, the apportionment to be based upon the registration of automobiles in each county, and the funds distributed to the counties shall likewise be used exclusively for highway purposes. (Bill of Complaint, paragraph VII, Cl. Tr. pp. 7, 8.)

> "That said highway taxes provided for by said constitutional amendment are assessed and levied against, and the collection of said tax is limited to, only common carriers transporting persons or property for compensation over any public highway in the state between fixed termini, or over a regular route, excluding school busses when operated by school districts, and are not intended to apply and do not apply and have not been applied to common carriers not operating between fixed termini or over a regular route, transporting persons or property for compensation over any public highway in the state, nor to exclusive contract or private carriers operating for compensation over the same highways, nor to any other class of carriers using said highways; and that such common carriers not operating between fixed termini or over regular routes and such contract or private carriers and all other classes of carriers using said highways are entirely excluded from the payment of said highway taxes and pay no state taxes other than a corporate franchise tax assessed on the basis of the full cash value of such corporate franchise, if they be corporations, but not otherwise, and license taxes and in addition thereto local, county

and municipal taxes." (Bill of Complaint, Paragraph VIII, Cl. Tr. pp. 8, 9.)

"That the major portion of the transportation business of most of plaintiffs herein is limited to the transportation of farm products consisting of fruits and vegetables, mostly perishable, grown in the Santa Clara, Watsonville, Pajaro, Salinas and adjacent valleys situated south of San Francisco Bay, to the San Francisco fruit and produce commission market; that because of the nature of the commodities transported and the necessity for rapid transit said commodities are picked up and loaded on the farms, ranches and orchards where produced and carried into the San Francisco market over the public highways usually between sunset and sunrise to the great advantage and convenience of producer, middleman and consumer and is a service that could not be so rendered by any other existing form of carrier; that the busiest season of the year for plaintiffs and all other common and contract or private carriers operating within said state over the public highways, commences in the late spring and ends in the early fall; that principally during said season of the year and also in a less degree at other times, a large number of motor vehicle common carriers and contract or private carriers, to the extent of at least five hundred operators transporting property for hire over the public highways in California, that do not come within the definition of the common carriers taxed under said constitutional amendment and said act, enter into direct and keen competition with the various plaintiffs herein in the transporting of commodities or property over the public highways of said state; that said common and contract or private carriers not subject to said highway tax are also not subject to regulations as to routes, termini, period of operation, or in any other respect by the State Railroad Commission or any other public state authority, and are not required and do not pay an average annual total of local, municipal, county and state taxes and licenses,

excepting none, and of every kind combined, in excess of twenty-five per centum (25%) or one-fourth (¼) of the amount of the gross receipts or highway tax required to be paid annually by the respective plaintiffs herein where said plaintiffs and the said excluded or non-taxable carriers each use exclusively in said business over the same routes and in direct competition under like conditions, a total taxable operative property of equal full cash or assessable value; that the same average difference between all combined taxes and licenses of every kind as aforesaid required to be paid by all carriers not subject to said highway tax and common carriers subject to said highway tax operating over competitive routes, with taxable operative property of equal full cash or assessed value, prevails throughout the State of California, namely, that said common carriers operating in California subject to said highway tax are thereby assessed and obligated to pay an average of four times the amount of taxes, notwithstanding their exemptions from all other kinds of taxes, that all other highway carriers for compensation not subject to said tax are assessed and obligated to pay for all local, municipal, county and state taxes and licenses of every kind combined; that the average full cash value of operative property, that is to say of all property used exclusively in said business of carrier of all common carriers and of all private or contract carriers that operate over the public highways of California carrying property for compensation is not in excess of one fourth (¼) or twenty-five per centum (25%) of the average annual gross receipts derived from such business by said carriers." (Bill of Complaint, Paragraph IX, Cl. Tr. pp. 9. 10, 11.)

"That the average total annual rate or percentage of taxes that carriers not subject to said highway tax operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind com-

bined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to plaintiffs herein on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced." (Bill of Complaint, Paragraph X, Cl. Tr. p. 11.)

"That the aforesaid competitors of plaintiffs operating as contract or private carriers and common carriers of property for hire over the said public highways not subject to said tax use the said public highways in the same manner, to the same degree, with same type of vehicles, employ the same methods of operation and have the same source of receipts as the plaintiffs and are in direct and keen competition with plaintiffs; and that said tax is therefore arbitrary, oppressive, unjust, unlawful, illegal, discriminatory and burdensome, and is not justified by reason of any difference in the source of receipts or in the situation or character of the property employed by the common carriers subject to the tax and by those carriers for hire not subject to the tax, and it is therefore class legislation and denies to the plaintiffs the equal protection of the laws in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States." (Bill of Complaint, Paragraph XI, Cl. Tr. p. 12.)

"That plaintiffs have no plain, speedy and adequate or complete remedy at law, and unless defendant is immediately enjoined and restrained from seizing and selling the property of plaintiffs to enforce the collection of said taxes the plaintiffs will suffer irreparable injury and damage and will be deprived of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to said Constitution of the United States in manner following, to wit:

"That plaintiffs are afforded the right by statute to pay said taxes under protest on the ground of illegality and to thereafter bring suit against the Treasurer of the State of California for the recovery of such taxes; that no provision is made for the payment of interest on such taxes paid under protest during the pendency of such suit; that no provision is made by law for the payment of any judgment so recovered; that such judgment cannot be collected by execution against the state or its property or by any of the ordinary processes of law provided for the enforcement of judgments; that no provision for the payment of such judgment so recovered can be made except by specific and separate appropriation and legislation by the legislature of said state in such manner and at such time as it sees fit and that it may at its pleasure refuse to do so; that said taxes are required to be paid into the general fund of said state and within three months thereafter one-half the amount of said collected taxes is required to be apportioned and distributed among the fifty-eight counties of said state; that said taxes could not therefore be traced and refunded by said state treasurer if he had the legal authority to do so in satisfaction of any judgment so recovered; that to recover the one-half of said taxes paid to said counties the plaintiffs would be obliged to institute separate and distinct suits against said counties thereby causing a multiplicity of suits; that the integrity and success of the business of plaintiffs depends upon a continuity of service and that if said property of plaintiffs is seized and sold at public auction by said defendant, plaintiffs will be deprived of the opportunity to transact business therewith and their routes, patronage and business will be thereby wholly disrupted, destroyed and lost beyond recovery or rehabilitation; that no relief or satisfaction in damages could be obtained against said defendant to compensate plaintiffs for the loss of their property, routes, patronage and business, and it would be extremely difficult

> to compute or estimate the amount of such damages; that if said taxes are not paid on or before the sixth Monday after the first Monday in July, 1928, one-half the amount thereof is subject to a penalty equal to fifteen per centum (15%) of the amount thereof and will be added thereto, and an additional penalty of five per centum (5%) will be added to the amount remaining unpaid on the first Monday in February, 1929; that if said taxes are not paid on or before the Saturday preceding the first Monday in March, 1929, the plaintiffs herein that are corporations will have their respective corporate rights, powers and privileges suspended and thereafter will be incapable of exercising the same." (Bill of Complaint, Paragraphs XV, XVI, Cl. Tr. pp. 15, 16, 17.)

The appellants sought by the prayer of their bill and on their motion for interlocutory injunction, to enjoin the appellee or State Controller of California from taking any steps, action or proceedings to enforce or compel the appellants to pay or discharge the said highway tax; that said constitutional amendment and the statute giving efficacy thereto be declared in violation of the Fourteenth Amendment of the Constitution of the United States and null and void, and that the said appellee be perpetually enjoined from collecting said taxes or any portion thereof, and for general relief in equity. (Bill of Complaint, Cl. Tr. p. 18.)

The Court heard the motion for an interlocutory injunction of the appellants and also at the same time, the motion to dismiss of the appellee. It denied the former and granted the latter. (Cl. Tr. p. 32.)

From said order or decree the appellants have taken this appeal.

CASES SUSTAINING JURISDICTION TO REVIEW ON APPEAL.

The order or decree is the subject of direct appeal to this Court under the provision of Section 266 of the Judicial Code, Section 380, U. S. C. A., Title 28; likewise under the provisions of Section 238 of the Judicial Code, Section 345, U. S. C. A., Title 28.

The Federal Courts have jurisdiction of a suit to enjoin enforcement of taxes levied by state authorities where the tax is unconstitutional and the state laws afford no adequate remedy.

Hopkins v. Southern California Tel. Co., 72 L. Ed. 178 (Advance Op. decided Jan. 3, 1928);
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. ....., 28 Sup. Ct. Rep. 7;
Home Telep. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312;
Binderup v. Pathe Exch., 263 U. S. 291, 68 L. Ed. 308, 44 Sup. Ct. Rep. 96.

The application for the preliminary injunction having been pressed to a determination before the Court of three judges the case is properly here on direct appeal.

Interstate Busses Corporation v. Blodgett, 72 L. Ed. p. 243, (Advance Op.), 48 S. C. Rep. 230;

Smith v. Wilson, 273 U. S. 388, 71 L. Ed. 699, 47 Sup. Ct. Rep. 385;
Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 Sup. Ct. Rep. 702.

Dated, San Francisco,
November 28, 1928.

Respectfully submitted,
SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Solicitors for Appellants.

FILE COPY

FILED
FEB 21 192
CHARLES ELMORE C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1928

No. [redacted] 13

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,

Appellants,

vs.

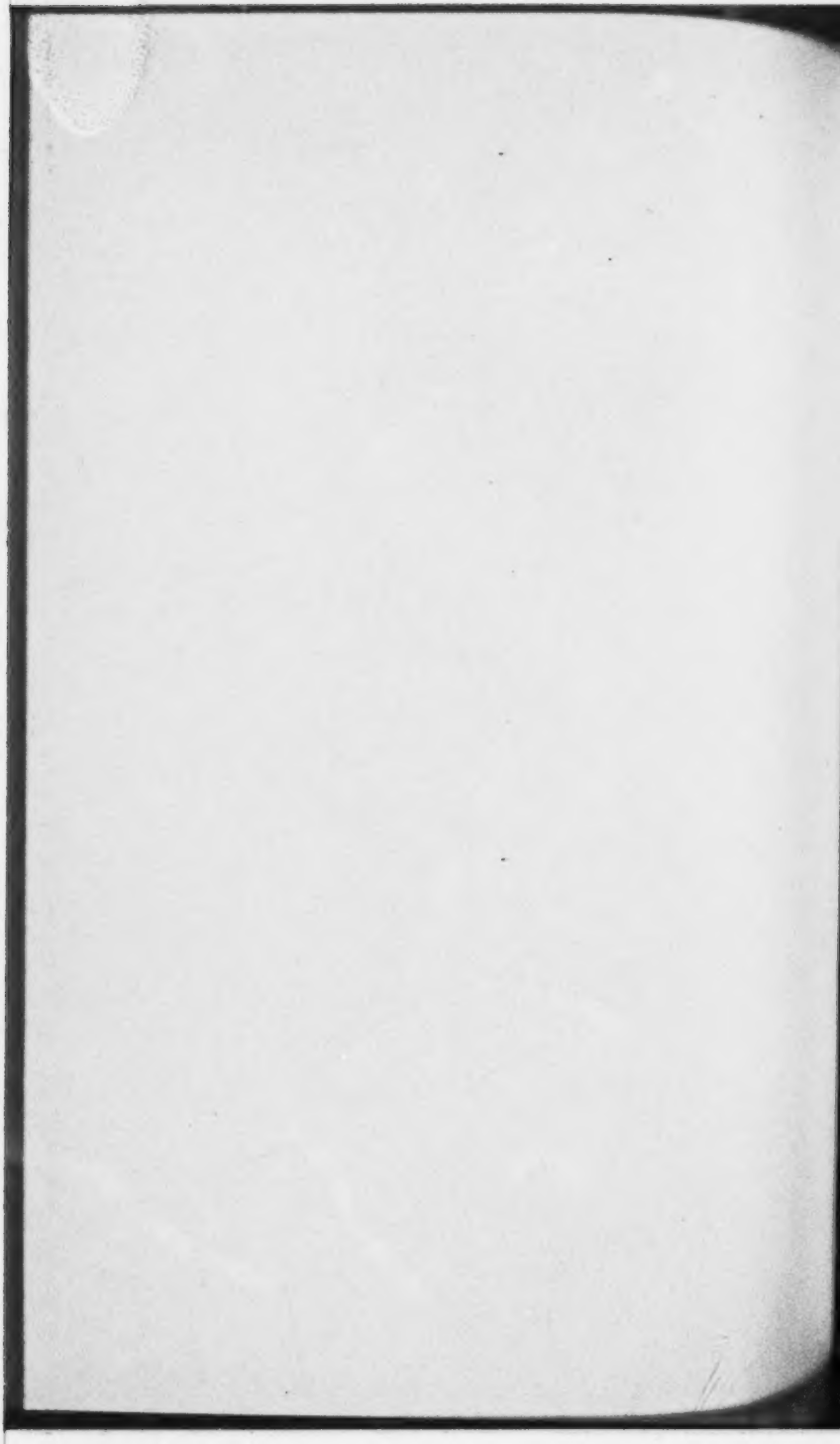
RAY L. RILEY, as State Controller of the State of California,

Appellee.

BRIEF FOR APPELLANTS.

SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Standard Oil Building, San Francisco,
Solicitors for Appellants.

WALSH PRINTING CO., SAN FRANCISCO



Subject Index

	Page
Statement of the case	1
Assignments of error	15
Argument	18
(a) The legislation is discriminatory	20
(b) The carriers for hire not subject to the tax do not pay an equivalent in other taxes	33
Conclusion	35
Appendix (follows page 36)	i

Table of Cases and Statutes Cited

Pages

Bacon Service Corporation v. Huss, 199 Cal. 21..... 2
Bacon Service Corp. v. Huss, 72 L. Ed. 224, Adv. Op..... 2
Barbier v. Connolly, 113 U. S. 27, etc. 31

Connolly v. Union Sewer Pipe Co., 184 U. S. 565, etc.... 23
Constitution of the State of California, Article XIII, Section 15.....3, 5, 16, 17, 35, App. xii
Constitution of the United States, Amendment XIV, Section 1 .....7, 12, 13, 16
Cotting v. Goddard, 183 U. S. 79, etc. 35
Cudahy Packing Co. v. Minnesota, 246 U. S. 450, etc..... 29

Frick v. Pennsylvania, 268 U. S. 473, etc. 29
Frost v. Railroad Commission, 197 Cal. 230.....25, 26
Frost v. Railroad Commission, 271 U. S. 583, etc.....27, 30

Hayes v. Missouri, 120 U. S. 68, etc. 31

Louisville Gas & Electric Co. v. Coleman, 72 L. Ed. 488.. 33

Panhandle Oil Co. v. Mississippi, 72 L. Ed. 517..... 29
Political Code of the State of California, Section 3664aa.. 5
Power Mfg. Co. v. Saunders, 274 U. S. 490, etc. 29

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. 607.....29, 33

Report of California State Board of Equalization for 1927-28 28

Schmolke, Re, 199 Cal. 42..... 3
Schmolke v. O'Brien, 273 U. S. 646, etc. 3
Statutes of California, 1856, p. 145..... 30
Statutes of California, 1917, Chapter 213, p. 330..... 6
Statutes of California, 1919, Chapter 290, p. 458.....24, 27
Statutes of California, 1923, Chapter 341, p. 706..... 2, 20
Statutes of California, 1925, Chapter 412, p. 833..3, 20, App. i
Statutes of California, 1925, Chapter 60, p. 386.....3, App. xii
Statutes of California, 1927, p. lxxxviii..... 3
Statutes of California, 1927, Chapter 19, p. 17.....
.....3, 16, 17, 36, App. xvi
Statutes of California, 1927, Chapter 843, p. 708..4, 23, App. xi

Truax v. Corrigan, 257 U. S. 312, etc. 32

Williams v. Standard Oil Co., 73 L. Ed. Adv. Op. 141....22, 23

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 530

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,
Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

In 1923 the legislature of California first enacted a statute providing for the assessment and levy of a highway transportation tax, to be collected annually from all persons, firms, associations and corporations who operate motor vehicles upon any public highway in the state and thereby engage in the transportation of persons or property for hire or compensation. The tax was a four per cent gross receipts tax based upon

the annual gross receipts of the operator for the year preceding the tax year. The statute exempted certain classes of operators, the principal exemptions being (1) those operating various motor vehicles within incorporated cities or towns and not over any portion of any state or county highway; (2) sight seeing busses; and (3) operators who derived as much as fifteen per cent of their gross receipts from United States mail contracts. The tax was a commutated or substituted state tax in lieu of all licenses on the business and local taxation on the property of the operator used exclusively in the business of transporting persons or property for hire over the public highways and was dedicated entirely to the maintenance and repair of said highways, one-half of said tax being retained by the state for such purposes and the remaining one-half thereof being apportioned among the fifty-eight counties of the state for like purposes, the percentage of apportionment being determined by the number of registered automobiles in each county. (*Statutes of California,* 1923, Chapter 341, page 706.) The constitutionality of this act, with the exception of certain exemptions, to which we will advert later in this brief, was sustained by the Supreme Court of the state in *Bacon Service Corporation v. Huss,* 199 Cal. 21. This Court denied a writ of certiorari. (*Bacon Service Corp. v. Huss,* ..... U. S. ....., 72 L. Ed. 224 Ad. Op. Memo.)

In 1925 this act was superseded by a statute similar in import, form and effect enacted to remedy certain constitutional objections to the earlier statute. (*Sta-*

utes of California, 1925, Chapter 412, p. 833, Appendix hereto p. i.) The constitutionality of this latter act was sustained by the state Supreme Court, in *Re Schmolke,* 199 Cal. 42; and this Court denied a writ of certiorari. (*Schmolke v. O'Brien* (Mem.), 273 U. S. 646, 47 S. Ct. Rep. 244, 71 L. Ed. 820.)

On the 2nd day of November, 1926, there was adopted by the people of the State of California, at a general election held on said date, an amendment to the Constitution of said state known and designated as Assembly Constitutional Amendment No. 37, proposed by the legislature of said state, filed in the office of the Secretary of State of California on the 27th day of April, 1925, and contained in Chapter 60, 1925 Statutes of California, and page lxxxviii, Statutes of 1927 of said state, identified as and becoming Section 15 of Article XIII of the Constitution of said state. (App. pp. xii-xvi.)

In order to carry into effect and fully enforce the said constitutional amendment the legislature of said state duly passed an act at the 1927 session thereof entitled: "An act to add three new sections to the Political Code to be numbered three thousand six hundred sixty-four aa, three thousand six hundred seventy bb and three thousand six hundred seventy cc, relating to taxation of highway transportation companies for state purposes," which act was duly approved by the Governor of said state on the 5th day of March, 1927, and went into effect immediately; said act being Chapter 19 of the 1927 Statutes of California. (App. pp. xvi-xxiv.)

At the same session of the legislature the Act of 1925 hereinbefore referred to was repealed, (Statutes of California, 1927, Chap. 843, p. 1708; App. p. xi) thus leaving the constitutional amendment and the statute enacted to carry same into effect as the only legislation providing for the assessment, levy and collection of a highway transportation tax.

The legislation of 1927 provides for an annual tax of *four and one-quarter per cent* on the yearly gross receipts of motor vehicle operators coming within the definition of the act carrying express matter and passengers and their baggage, and *five per cent* on the yearly gross receipts of such operators carrying property or freight, in lieu of all other state, county and municipal taxation, and exempts such carriers from all licenses and local taxation appertaining to the business and property of the operators when such property is used exclusively in the business of carrier.

The portions of said legislation vitally affecting this case read as follows:

> "Sec. 15. Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies,' as used in this section, shall include per-

sons, partnerships, joint stock associations, companies and corporations.

"(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

"All such companies operating trucks or auto trucks engaged in the business of transporting property shall anually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state.

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies, provided, that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state." (Sec. 15, Art. XIII, Constitution of California; App. pp. xii-xvi; California Political Code, Sec. 3664 aa; App. p. xvi.)

This legislation does not provide for the payment of a highway transportation tax by any carrier using the public highways in the state for the carriage of persons or property for hire or compensation, except

common carriers operating between *fixed termini* or over a *regular route.* Under the existing legislation all other carriers for hire are free to use said highways indiscriminately without such taxation, except the payment of comparatively nominal license fees and local taxation the annual amount of which in the aggregate does not exceed twenty-five per cent of the amount of the highway tax. (R. p. 7, fols. 8, 9.)

Each of the appellants herein is classed by the State Railroad Commission and the State Board of Equalization, respectively, of the State of California, as a common carrier transporting freight or property, over the public highways in said state between fixed termini or over regular routes, for hire, and as such classified common carrier each of them holds, and operates over said public highways by virtue of, a certificate of public convenience and necessity issued by said State Railroad Commission, and as such classified common carrier each of them is subject to the operative limitations prescribed by the laws of said state and the rules and regulations of said Railroad Commission made in pursuance thereof (Chapter 213, p. 330, 1917 Statutes of California.) (R. p. 3, fol. 4.)

Between the first Monday in March, 1928, and the third Monday before the first Monday in July, 1928, the State Board of Equalization of California, in the manner provided by law, assessed and levied against each of the plaintiffs herein the said highway tax of five per cent of the gross receipts derived from operations by each of them during the preceding year, said tax covering the fiscal year beginning July 1, 1928, and

ending June 30, 1929, and aggregating $39,090.66; and the appellee, as Controller of the State of California, acting under the authority vested in him by the laws of the state notified the appellants that unless they paid the said tax by July 2, 1928, he would seize and sell a sufficient amount of their property to pay the tax with penalties and costs. (R. p. 12, fol. 15.)

Thereupon, the appellants on the 21st day of July, 1928, commenced this action to enjoin the enforcement of the tax, and to declare the legislation, including the constitutional amendment, on which the tax is based, to be discriminatory and in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States and prayed for an interlocutory and permanent injunction. (R. p. 14, fol. 18.) A motion for an interlocutory injunction was duly and regularly made in the District Court before three federal judges and by them denied. (R. p. 19, fols. 33, 34.) The motion was made on the verified bill of complaint. The appellee demurred to the bill by a motion to dismiss. (R. p. 18, fol. 27.) This appeal is prosecuted to this Court from the decree entered denying the motion for an interlocutory injunction and dismissing the bill. (R. p. 20, fol. 35.)

No opinion was rendered or filed by the lower court.

The grounds of appellants' motion and of this appeal and the admitted facts in support thereof can be most concisely stated by quoting from portions of appellants' bill of complaint, as follows:

> "That said constitutional amendment and the said act provide, among other things, that the

taxes to be assessed, levied and collected as therein provided shall be entirely and exclusively for highway purposes; that said taxes shall be in lieu of all other taxes and licenses, state, county and municipal upon the property of the common carriers hereinbefore described used exclusively in the operation of their transportation business in said state; provided that nothing therein shall be construed to release such common carrier from the payment of any amount required to be paid for any special privilege or franchise theretofore granted by any of the municipal authorities of said state; that revenues derived from said taxes shall be deposited in the general fund of said state; that one-half thereof are appropriated and set aside to said state to be devoted exclusively to the maintenance and repair of public highways within the State and that the remaining one-half thereof shall be apportioned among and distributed to the respective fifty-eight counties of said state in the proportion that the number of motor vehicles registered within each county for the preceding calendar year bears to the total number of motor vehicles registered in said state, and the sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within said counties; that the gross receipts upon which said taxes shall be computed shall be the gross receipts for the calendar year preceding the year in which said assessment and levy are made and that said taxes shall become a lien on all of the property covered by said tax on the first Monday in March of each year after the adoption of said constitutional amendment and shall become due and payable annually on the first Monday in July thereafter; that certain enumerated sections of the Political Code of said state already in effect shall apply and be construed to apply to all common carriers subject to said tax with the same force and effect as if said common carriers were therein exclusively mentioned." (R. p. 6, fols. 7, 8, 9.)

"That said highway taxes provided for by said constitutional amendment are assessed and levied against, and the collection of said tax is limited to, only common carriers transporting persons or property for compensation over any public highway in the state between fixed termini, or over a regular route, excluding school busses when operated by school districts, and are not intended to apply and do not apply and have not been applied to common carriers not operating between fixed termini or over a regular route, transporting persons or property for compensation over any public highway in the state, nor to exclusive contract or private carriers operating for compensation over the same highways, nor to any other class of carriers using said highways; and that such common carriers not operating between fixed termini or over regular routes and such contract or private carriers and all other classes of carriers using said highways are entirely excluded from the payment of said highway taxes and pay no state taxes other than a corporate franchise tax assessed on the basis of the full cash value of such corporate franchise, if they be corporations, but not otherwise, license taxes hereinafter more particularly mentioned, and in addition thereto local, county and municipal taxes hereinafter more particularly mentioned." (R. p. 7, fols. 8, 9.)

"That the major portion of the transportation business of most of plaintiffs herein is limited to the transportation of farm products consisting of fruits and vegetables, mostly perishable, grown in the Santa Clara, Watsonville, Pajaro, Salinas and adjacent valleys situated south of San Francisco Bay, to the San Francisco fruit and produce commission market; that because of the nature of the commodities transported and the necessity for rapid transit said commodities are picked up and loaded on the farms, ranches and orchards where produced and carried into the San Francisco market over the public highways usually

between sunset and sunrise to the great advantage and convenience of producer, middleman and consumer and is a service that could not be so rendered by any other existing form of carrier; that the busiest season of the year for plaintiffs and all other common and contract or private carriers operating within said state over the public highways, commences in the late spring and ends in the early fall; that principally during said season of the year and also in a less degree at other times, a large number of motor vehicle common carriers and contract or private carriers, to the extent of at least five hundred operators transporting property for hire over the public highways in California, that do not come within the definition of the common carriers taxed under said constitutional amendment and said act, enter into direct and keen competition with the various plaintiffs herein in the transporting of commodities or property over the public highways of said state; that said common and contract or private carriers not subject to said highway tax are also not subject to regulations as to route, termini, period of operation, or in any other respect by the State Railroad Commission or any other public state authority, and are not required and do not pay an average annual total of local, municipal, county and state taxes and licenses, excepting none, and of every kind combined, in excess of twenty-five per centum (25%) or one-fourth (¼) of the amount of the gross receipts or highway tax required to be paid annually by the respective plaintiffs herein where said plaintiffs and the said excluded or non-taxable carriers each use exclusively in said business over the same routes and in direct competition under like conditions, a total taxable operative property of equal full cash or assessable value; that the same average difference between all combined taxes and licenses of every kind as aforesaid required to be paid by all carriers not subject to said highway tax and common carriers subject to said highway tax op-

erating over competitive routes, with taxable operative property of equal full cash or assessed value, prevails throughout the State of California, namely, that said common carriers operating in California subject to said highway tax are thereby assessed and obligated to pay an average of four times the amount of taxes, notwithstanding their exemptions from all other kinds of taxes, that all other highway carriers for compensation not subject to said tax are assessed and obligated to pay for all local, municipal, county and state taxes and licenses of every kind combined; that the average full cash value of operative property, that is to say, of all property used exclusively in said business of carrier, of all common carriers and of all private or contract carriers that operate over the public highways of California carrying property for compensation is not in excess of one fourth (¼) or twenty-five per centum (25%) of the average annual gross receipts derived from such business by said carriers." (R. p. 7, fols. 9, 10, 11.)

"That the average total annual rate or percentage of taxes that carriers not subject to said highway tax operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind combined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to plaintiffs herein on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced." (R. p. 9, fol. 11.)

"That said gross receipts tax is purely and solely a tax for highway purposes apportioned between the state and the various counties of the state of California to be devoted exclusively to the maintenance and repair of public highways;

that the aforesaid competitors of plaintiffs operating as contract or private carriers and common carriers of property for hire over the said public highways not subject to said tax use the said public highways in the same manner, to the same degree, with same type of vehicles, employ the same methods of operation and have the same source of receipts as the plaintiffs and are in direct and keen competition with plaintiffs; and that said tax is therefore arbitrary, oppressive, unjust, unlawful, illegal, discriminatory and burdensome, and is not justified by reason of any difference in the source of receipts or in the situation or character of the property employed by the common carriers subject to the tax and by those carriers for hire not subject to the tax, and it is therefore class legislation and denies to the plaintiffs the equal protection of the laws in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States." (R. p. 9, fol. 12.)

"That the common carriers subject to said tax are subject to control by said Railroad Commission as to termini and routes, kind of transportation carried, class of vehicles used, term or period of operation and other similar regulations while said competitive common carriers and contract or private carriers—not subject to said tax using said public highways for hire are free from said limitations, restrictions and regulations, thus affording the latter classes of carriers freedom of action with respect to choice of business, routes, seasonal operations and all other regulations enforced by said State Railroad Commission against plaintiffs, which liberty of action said classes of carriers do now freely exercise, and which the plaintiffs herein do not possess and do not and cannot exercise, and the said non-taxable classes of carriers for hire are permitted to and do use and enjoy, and derive their income exclusively from the use and enjoyment of said public highways without paying any part or portion of the

said highway tax or without contributing in any manner toward the maintenance or repair of said public highways beyond what all owners and operators of motor vehicles that do not enjoy or use said public highways as carriers for hire contribute toward their maintenance and repair, to the unfair and great injury and damage of plaintiffs and which will, if allowed to continue, amount to a confiscation of the property and business of the plaintiffs and render plaintiffs insolvent; and that said highway tax is thereby made a double burden on the free and equal competition of plaintiffs with said carriers for hire not subject to said tax and is an unlawful, void and illegal tax and unjustly discriminates against plaintiffs thereby denying to plaintiffs the equal protection of the laws in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States." (R. p. 10, fols. 12, 13.)

"That plaintiffs are afforded the right by statute to pay said taxes under protest on the ground of illegality and to thereafter bring suit against the Treasurer of the State of California for the recovery of such taxes; that no provision is made for the payment of interest on such taxes paid under protest during the pendency of such suit; that no provision is made by law for the payment of any judgment so recovered; that such judgment cannot be collected by execution against the state or its property or by any of the ordinary processes of law provided for the enforcement of judgments; that no provision for the payment of such judgment so recovered can be made except by specific and separate appropriation and legislation by the legislature of said state in such manner and at such time as it sees fit and that it may at its pleasure refuse to do so; that said taxes are required to be paid into the general fund of said state and within three months thereafter one-half the amount of said collected taxes is required to be apportioned and

distributed among the fifty-eight counties of said state; that said taxes could not therefore be traced and refunded by said state treasurer if he had the legal authority to do so in satisfaction of any judgment so recovered; that to recover the one-half of said taxes paid to said counties the plaintiffs would be obliged to institute separate and distinct suits against said counties thereby causing a multiplicity of suits; that the integrity and success of the business of plaintiffs depends upon a continuity of service and that if said property of plaintiffs is seized and sold at public auction by said defendant, plaintiffs will be deprived of the opportunity to transact business therewith and their routes, patronage and business will be thereby wholly disrupted, destroyed and lost beyond recovery or rehabilitation; that no relief or satisfaction in damages could be obtained against said defendant to compensate plaintiffs for the loss of their property, routes, patronage and business, and it would be extremely difficult to compute or estimate the amount of such damages; that if said taxes are not paid on or before the sixth Monday after the first Monday in July, 1928, one-half the amount thereof is subject to a penalty equal to fifteen per centum (15%) of the amount thereof and will be added thereto, and an additional penalty of five per centum (5%) will be added to the amount remaining unpaid on the first Monday in February, 1929; that if said taxes are not paid on or before the Saturday preceding the first Monday in March, 1929, the plaintiffs herein that are corporations will have their respective corporate rights, powers and privileges suspended and thereafter will be incapable of exercising the same." (R. pp. 12, 13, fols. 16, 17.)

"That the amount of tax fairly and equitably due from each of the plaintiffs herein is twenty-five per centum (25%) of the respective amounts assessed, levied and attempted to be collected from each of said plaintiffs herein as hereinbefore alleged; and that said plaintiffs are ready,

willing and able, and each of them does hereby offer to pay into court a fair, just and non-discriminatory tax in the premises which plaintiffs allege to be said twenty-five per centum (25%) of said respective annual gross receipts taxes, upon the granting of an injunction herein." (R. p. 14, fol. 17.)

We are permitted to add with consent of the Attorney General that prior to the commencement of this suit the appellants had informed the appellee that they were prepared to tender twenty-five (25%) per cent of the amount of said tax as a just amount due the state and that the appellee informed the appellants that it was useless to make such tender as he would not accept the same, and that the only tender he would consider or accept was the whole amount of the tax, hence the offer was made to pay the amount into Court, as alleged in the bill. (R. p. 14, fol. 17

ASSIGNMENTS OF ERROR.

The only assignments of error that appellants shall urge on this appeal are as follows:

I.

That the Court erred in deciding that plaintiffs' bill of complaint does not state facts sufficient to constitute a cause of action against the defendant herein or to entitle plaintiffs or any of them to the whole or any part of the relief prayed for in said bill. (R. p. 20.)

VII.

That said Court erred in deciding that the granting of the interlocutory injunction applied for will

seriously injure and embarass the State of California in the administration of its revenue laws and in the conduct of its govermental affairs. (R. p. 21.)

VIII.

That said Court erred in deciding that the assessments and levies against the plaintiffs are valid. (R. p. 21.)

IX.

That said Court erred in deciding that Section 15 of Article XIII of the Constitution of California is not contrary to the Fourteenth Amendment or any provision of the Constitution of the United States. (R. p. 21.)

X.

That said Court erred in deciding that Section 15 of Article XIII of the Constitution of the State of California and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of said state constitution and said statute enacted to carry same into effect apply only to common carriers operating for compensation between fixed termini or over regular routes over the public highways of said State of California, and do not apply to all other classes of common carriers and to private or contract carriers using the said public highways under like conditions and in competition with the plaintiffs herein. (R. p. 22.)

XI.

That said Court erred in deciding that Section 15 of Article XIII of the Constitution of the State of California, and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of the constitution of said state and said statute enacted to carry same into effect provide that and require the plaintiffs to pay in taxes a sum equal to an average of four times the amount of local, county, municipal and state taxes and licenses of all kind combined exacted from and required to be paid by their competitor carriers excluded from the aforesaid constitutional and statutory classification and using said public highways as such carriers under like conditions, in competition with the plaintiffs herein. (R. p. 22.)

XII.

That said Court erred in deciding that the five *per centum* gross receipts highway tax provided for in said section of the said state constitution and in said Chapter 19 of the 1927 Statutes of California and the assessment and levy thereof made against the plaintiffs herein, and the attempt to enforce the collection thereof against said plaintiffs and their property are not a double or discriminatory burden on the free and equal competition of the plaintiffs herein with all classes of carriers for compensation not subject to said tax and using the said public highways in competition with said plaintiffs. (R. p. 22.)

XIV.

That said Court erred in deciding that the enforcement of said state constitutional amendment and the aforesaid statute enacted to carry same into effect and the collection of said tax would not deprive plaintiffs of their property without due process of law. (R. p. 23.)

Although the lower Court rendered no opinion in deciding the motion for interlocutory injunction, thus failing to indicate the basis of its decision and ordinarily requiring the complete briefing of all the points covered by the assignment of errors, it will not be necessary to do so in this case for the reason that the appellee has stipulated that he does not intend to argue the matters covered by the remaining assignments of error.

The effect of this stipulation is to require the briefing and argument of but one proposition, into which all of the assignments of error above quoted and intended to be urged may be grouped, namely:

The constitutional amendment and the statute enacted to carry same into effect are discriminatory and deny to appellants the equal protection of the laws.

ARGUMENT.

The State Constitutional Amendment and the statute enacted to carry same into effect are discriminatory for the following reasons:

1. The classification excludes all carriers except specially defined common carriers using the public

highways to transport persons or property for hire or compensation even when the excluded carriers are in direct competition with the common carriers subject to the tax and when there is no difference in the source of their receipts or in the situation a character of the property employed by them.

2. The classification excludes all common carriers except common carriers operating between fixed termini or over regular routes.

3. The legislation discriminates unjustly between the carriers of freight and the carriers of passengers, taxing the former 5% and the latter 4¼% on their annual gross receipts.

4. The tax is a highway tax dedicated exclusively to the maintenance and repair of the state and county highways and therefore should, but it does not, apply equally to all carriers using the state and county highways in the business of transporting persons or property for hire or compensation.

5. The carriers for hire not subject to the tax do not pay an equivalent in other taxes, but on the contrary pay annually in the aggregate for all taxes and licenses of every kind combined a sum that does not average more than 25% of the amount of annual taxes paid by appellants under the legislation in question.

Since the points specified under subtitles 1, 2, 3 and 4 are corelated and interdependent we shall discuss them as one proposition.

(a) *The legislation is discriminatory.*

Prior to the constitutional amendment in question making common carriers operating between fixed termini or over regular routes subject to a gross receipts highway tax, there had previously been enacted by the legislature of California two statutes levying a similar tax, one being the Act of June 13, 1923, Statutes of 1923, page 706, and the other a statute similar in form and effect, being the Act of 1925, Statutes of 1925, page 833. (App. p. i.)

These two acts included "all persons, firms, associations, and corporations who operate motor vehicles upon any public highway in this state and thereby engage in the transportation of persons or property for hire or compensation"; but the Act of 1923 exempted certain classes, the three principal exemptions being (1) various motor vehicles operating within incorporated cities or towns and not over any portion of any state or county highway; (2) sight seeing busses and (3) operators who derived as much as fifteen per cent (15%) of their gross receipts from United States mail contracts. The constitutionality of this act of 1923 was determined by the Supreme Court of California in the case of *Bacon Service Corporation v. Huss,* 199 Cal. 21. The state Supreme Court held that the Act was constitutional so far as it exempted those operating within the limits of municipalities, for the reason that *"highways within the municipalities were usually not maintainable directly at the expense of the state but from municipal revenues"* but it held that sight-seeing

motor vehicles conceded to operate in county territory outside of incorporated cities, could not be constitutionally exempted and in so deciding, it said, at page 31:

> "There appears to be no natural or intrinsic and certainly no constitutional distinction between the use of the public highways by the vehicles of the respondent and the same use by sight-seeing busses regularly using the highways of the state outside of municipalities in the business of transporting persons or property for hire."

The state Supreme Court also held in that case that United States mail contract carriers could not be arbitrarily classified as being excluded from this tax and so deciding, it held at page 31:

> "It is difficult to perceive how this exemption may be justified when it relieves from the burden of the license tax those operators who conduct a motor-bus business outside of municipalities and who perchance may have acquired a government contract for the carriage of mail from which they derive at least fifteen per cent of their gross receipts. Under this exemption the entire revenues of such operators derived from business exclusive of mail contracts—and which may be as much as eighty-five per cent of their gross receipts— are relieved from the deduction of four per cent license tax while a like percentage of the gross receipts of those operators of the same class having no mail contracts are subjected to the tax. We see no legally justifiable basis for the distinction. It will be noted that the statute does not merely exempt the mail contract revenues from the license tax or four per cent but exempts the entire revenues of such operators from the requirements of the act. *We think that the exemption of sight-seeing motor-busses operating*

outside of municipalities and the exemption of the entire revenues of operators a part but not all of whose business embraces the carriage of United States mail and parcels post by contract were not based on any properly cognizable theory of classification."

In both the 1923 and 1925 highway transportation tax acts there was a saving clause providing that if any section, subsection, sentence, clause or phrase of the act should be held unconstitutional it was still the intention of the legislature that the remainder of the acts should be operative. Because of the saving clause in each of said two acts the state Supreme Court sustained the validity of the two respective acts, although deciding certain provisions in each of them to be unconstitutional and invalid.

Such saving clause only raised a presumption of divisibility.

Williams v. Standard Oil Co., 73 L. Ed. Adv. Op. pp. 141, 143, decided Jan. 2, 1929.

In the case at bar, however, neither the constitutional amendment nor the statute enacted to carry same into effect contains any saving clause, and it is quite apparent from the context of the constitutional amendment and the statute that they were intended to be effective as an entirety. It is plain from the language used in both of them that it was the intention to make the tax apply to only such common carriers as were subject to the jurisdiction of the Railroad Commission. In fact if the classification section is eliminated from the amendment and statute in question what is left would be but an empty shell.

"In the absence of such legislative declaration [a saving clause] the presumption is that the legislature intends an act to be effective as an entirety."

Williams v. Standard Oil Co., supra, at p. 143.

"If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative."

Connolly v. Union Sewer Pipe Co., 184 U. S. at p. 565, 46 L. Ed. at p. 692.

We respectfully suggest to this Honorable Court that it should be noted that the Act of 1923 held in part to be unconstitutional, as above specified, was a commutated or substituted tax in lieu of all local taxation exactly as the constitutional amendment and legislation in controversy provides for a commutated or substituted tax.

It will also be noted that the Acts of 1923 and 1925 included all classes of carriers regardless of whether they were within or without the jurisdiction of the State Railroad Commission, except the exceptions above specified.

The Act of 1925, which applied to *all types of carriers for hire* was repealed by the legislature in 1927, Statutes of 1927, page 1708, effective January 1, 1928, (App. p. xi), thereby leaving the constitutional amendment, and the executing legislation as the only law and statute imposing a gross receipts tax on highway carriers and thereby freed the private or contract

carriers and the common carriers not operating between fixed termini or over regular routes, from any further gross receipts tax.

The amendment to the Auto Stage and Truck Transportation Act, 1919 Statutes of California, Chapter 290, page 458, under which act the Railroad Commission takes jurisdiction of freight carriers, subsection (e), gives the Railroad Commission final jurisdiction to determine as a question of fact what operators do business between fixed termini or over a regular route. Said subsection (e) reads as follows:

> "(e) The words 'between fixed termini or over a regular route,' when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney bus, auto truck, stage or auto stage is operated by a transportation company 'between fixed termini or over a regular route' within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review."

It is also to be noted from said Auto Stage and Truck Transportation Act, Statutes of 1919, *supra* that the legislature attempted to give the Railroad Commission jurisdiction over all operators using the public highways for compensation, for its provides in subsection (c) of section (1) as follows:

> "(c) The term 'transportation company,' when used in this act means every corporation or person, their lessees, trustees, receivers or trus-

tees appointed by any court whatsoever, owning, controlling, *operating or managing, any* automobile, jitney bus, auto truck, stage or auto stage *used in the business of transportation* of persons or property, *or as a common carrier,* for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term transportation company,' as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses or *sightseeing busses,* or any other carrier which does not come within the term 'transportation company' as herein defined."

Sightseeing busses were there excluded from the jurisdiction granted, but private or contract carriers were attempted to be included. In the case of *Frost v. Railroad Commission,* 240 Pac. 27, 197 Cal. 230, the Supreme Court of California held that the said Act as amended in 1919 gave the Railroad Commission jurisdiction over private or contract carriers. In advancing grounds for holding that these private or contract carriers should rightfully be subject to the control of the Railroad Commission, the State Supreme Court used almost prophetic language so far as the contention of the appellants in this action that they are unfairly discriminated against in favor of private or contract carriers is concerned. We quote excerpts from that opinion which constitute the very basis of the grievances of the appellants in this case, that the tax as assessed and levied is an unfair discrimination, as follows:

"The rule * * * rests equally upon the circumstance that he (the carrier) is using the public highways as the chief instrumentality of a private business conducted for private gain. In other words, he is enjoying a special privilege in the highways which are constructed and maintained at public expense and designed for the common use of all."

Frost v. Railroad Commission, supra.

"We are of the opinion that the state has the right in the granting of such special privileges in its public highways to require that the recipient thereof in consideration therefor return a reasonable *quid pro quo* to the public."

Frost v. Railroad Commission, supra.

"It is at once apparent that the private carrier is or at least may be in direct competition with the public carrier, who is operating over the same route, and whose business it is the duty of the commission to supervise and regulate."

Frost v. Railroad Commission, supra.

"By this means they could take away from their competitor, who is operating as a common carrier under the restrictions and limitations imposed by the act, all of the most profitable and least burdensome of his business leaving him obligated to carry the unprofitable remainder thereof, and thus disable him to render the service which the public interest requires."

Frost v. Railroad Commission, supra.

It will thus be seen that any argument the learned Attorney General may advance to the effect that the appellants are protected from unfair competition by the fact that they are subject to the jurisdiction of the Railroad Commission, is without merit. Not

only are the appellants obliged to adhere to a fixed schedule of charges, rates and routes, and limited to certain classes of commodities which they may transport, and in other respects limited in their activities by the regulations of the Railroad Commission, but the contract or private carriers as well as the so-called "wildcats" or common carriers periodically operating during the busy seasons of the year and not following any regular routes or operating between fixed termini, are free from this heavy burden of gross receipts taxation and are also entirely free from restraint by the Railroad Commission. Undoubtedly the legislature intended to control them by the amendment to the Auto Stage and Truck Transportation Act of 1919, *supra,* and the Supreme Court of California believed that they should be so restrained by the Railroad Commission, but this Honorable Court in the case of *Frost v. Railroad Commission,* 271 U. S. 583, 70 L. Ed. 1101, 46 Sup. Ct. Rep. 605, held that the legislature of California could not impress, by legislation of any kind, the status of a common carrier upon a private or contract carrier and reversed the decision of the State Supreme Court that such carriers were subject to the jurisdiction of the Railroad Commission.

The tax should have been made to apply to any person operating any motor vehicle used on the public highways in the *business* of transportation of persons or property for hire *or* as a common carrier for hire. That would have brought all carriers using the public highways for compensation within the purview of the tax. When the sole object of the tax is considered,

namely, the maintenance and repair of the highways out of the revenues of those using the highways for hire all such carriers stand in the same relation to the law. There is no difference in the source of their receipts or in the situation or character of the property employed.

That the California State Board of Equalization, to which commission is entrusted the assessment and levy of the tax in controversy, itself realizes the discriminatory nature of the legislation imposing the tax, is evidenced by its last official report addressed to the Governor of the state. We quote from pages 16 and 17 of that report:

> "Although the present form of taxation on these companies is a distinct improvement over the former motor vehicle transportation license tax (repealed in 1927), there are certain inequalities existing under the present law which should be removed. *This tax is restricted to companies operating as common carriers over a regular route or between fixed terminals; the classification excludes from its purview the operations of those hauling under contract and those carrying on a spasmodic business in different sectors. Frequently, such operators come into direct competition with highway transportation companies and cause disastrous diminishment of the revenues of the latter, inasmuch as the contract haulers are not subject to as heavy taxation and, therefore, feel at liberty to cut rates.*"
>
> Report of the California State Board of Equalization for 1927-1928. (State Printing Office, Sacramento 1928.)

"The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its

legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based upon a real and substantial difference having a reasonable relation to the subject of the particular legislation.'"

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. 607, Advance Opinions; decided May 28, 1928;

Power Mfg. Co. v. Saunders, 71 L. Ed. 1165, 274 U. S. 490.

The instant case is almost identical with the case of *Quaker City Cab Co. v. Pennsylvania, supra,* recently decided by this Court. In that case the State of Pennsylvania levied a gross receipts tax on the earnings of incorporated taxicab companies but excluded natural persons and partnerships from liability for the tax. In deciding the tax to be discriminatory and a violation of the federal constitution this Court said:

"No doubt there are situations in which, as appears in Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 62 L. Ed. 827, 138 Sup. Ct. Rep. 373, and other cases, a percentage of gross earnings may be taken as a tax on property used in the business and properly may be deemed not to be a tax or burden on such earnings. But the practical operation of the section is to be regarded, and it is to be dealt with according to its effect. Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603; Panhandle Oil Co. v. Mississippi, (72 L. E. 517 Advance Opinions). Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as those upon a corporation."

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. at p. 609 Advance Opinions.

Contract or private carriers operating for hire between fixed termini or over regular routes on the public highways are not common carriers and therefore are not obliged to pay the tax in controversy.

Frost & Frost Trucking Co. v. Railroad Commission, 271 U. S. 583; 70 L. Ed. 1101, 47 A. L. R. 457, 46 Sup. Ct. Rep. 605.

Common carriers not operating over fixed termini or between regular routes are also excluded from this highway tax.

Both of these classes of carriers for hire use the public highways as freely as appellants, and in direct competition with them, yet they are not obligated to pay the tax. (R. p. 7, fol. 9.)

All motor truck operators carrying on business within municipalities and operating their trucks on call instead of on schedule are excluded from the tax. The answer may be made that they are rightly excluded since cities do not share in any portion of the tax collected from this source. That may be true as to all cities in California except the consolidated City and County of San Francisco. The boundaries of that city and county are identical as are all officials of the city and the county and municipal and county functions. (California Statutes of 1856, p. 145 and amendatory acts.) As one of the 58 counties of the state it is entitled to a proportion of the highway taxes collected from the appellants and other operators coming within the classification. The city and county of San Francisco is the second most populous county in the state, and we believe that this Honorable Court

will take judicial notice that the number of automobiles registered from that city and county is in reasonable proportion to its population. Hence a very substantial portion of the tax imposed under the legislation in question is allocated to the said City and County of San Francisco for the maintenance and repair of its public streets and highways, but not a cent thereof is contributed to that fund by the numerous trucking and draying companies operating motor vehicles on call within the said city and county. All they are obliged to pay are local taxes and state license fees the aggregate amount of which does not average in excess of 25% of the taxes paid by appellants. (R. p. 9, fol. 11.) This is an unreasonable and arbitrary discrimination. All who share in the substantial benefits of the tax, when the nature and character of their business is similar to those who are obliged to contribute, should likewise be made to contribute.

> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in Barbier v. Connolly, 113 U. S. 27, 28, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, of the equality clause, said: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operaton, it affects alike all persons similarly situated, is not within the amendment.' In Hayes v. Missouri, 120 U. S. 68, 30 L. Ed. 578, 7 Sup. Ct. Rep. 350, the court speaking through the same

justice, said the 14th Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however, limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124.

The difference between the taxes paid by excluded carriers and that paid by carriers subject to the tax is so palpably unfair and discriminatory that it should be apparent that plaintiffs are denied the equal protection of the laws.

"The gross receipts of incorporated operators are taxed while that of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. *The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed.* It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial

difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, supra. No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis."

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. at 609, Advance Opinions, decided May 28, 1928.

Furthermore the constitutional amendment and the statute enacted to carry same into effect arbitrarily discriminate between common carriers transporting freight and those transporting passengers. The former are taxed 5% on their annual gross receipts while the latter are only taxed 4¼%. (App. p. xvi.) There is no reasonable basis for such discrimination.

"The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed."

Quaker City Cab Co. v. Pennsylvania, supra.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

Louisville Gas & Electric Co. v. Coleman, 72 L. Ed. at p. 488, Advance Opinions, decided Apr. 30, 1928.

(b) *The carriers for hire not subject to the tax do not pay an equivalent in other taxes.*

It is alleged in appellants' verified bill, (Par. X, R. p. 9), and deemed admitted on these proceedings, that the average total annual rate or percentage of taxes that carriers not subject to said highway tax

operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind combined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to these appellants on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced.

It is further alleged in appellants' bill, and admitted, that the average full cash value of the operative property, that is to say, of all property used exclusively in the business of motor vehicle carrier by *all classes* of carriers transporting property for hire over the public highways of California is not in excess of one-fourth (¼) or twenty-five *percentum* (25%) of the annual gross receipts derived from such business by said carriers. In other words the annual gross receipts of the carriers is four times greater than the full cash value of the property used in creating those receipts. (R. p. 9, Par. IX.) Every four years the state would collect an aggregate of highway taxes equal to the full cash value of the property of the operators, most of which property is subject to rapid depreciation if not disintegration and is almost continually requiring repairs and replacements.

As the total combined annual taxes and license fees paid by the competitors of appellants do not

exceed 5% of the full cash value of their operative property, the appellants are obliged to pay four times the amount of annual taxes paid by the said competitors.

We do not believe a research of all the books reporting tax litigation will reveal a case of more oppressive, arbitrary and discriminatory taxation.

As applied to this situation no language is more appropriate than that used by this Court in the case of *Cotting v. Goddard,* 183 U. S. 79, 46 L. Ed. 92, 111, where this Court said:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations we must nevertheless always remember that the equal protection of the laws is guaranteed, and that *such protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other* * * * If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

CONCLUSION.

We submit that the decree denying the motion for an interlocutory injunction and granting the motion to dismiss is erroneous, and that the same should be reversed, with directions to the lower court, consisting of three judges, to grant the interlocutory and permanent injunctions prayed for against the appellee; and decreeing that said Section 15 of Article XIII of the Constitution

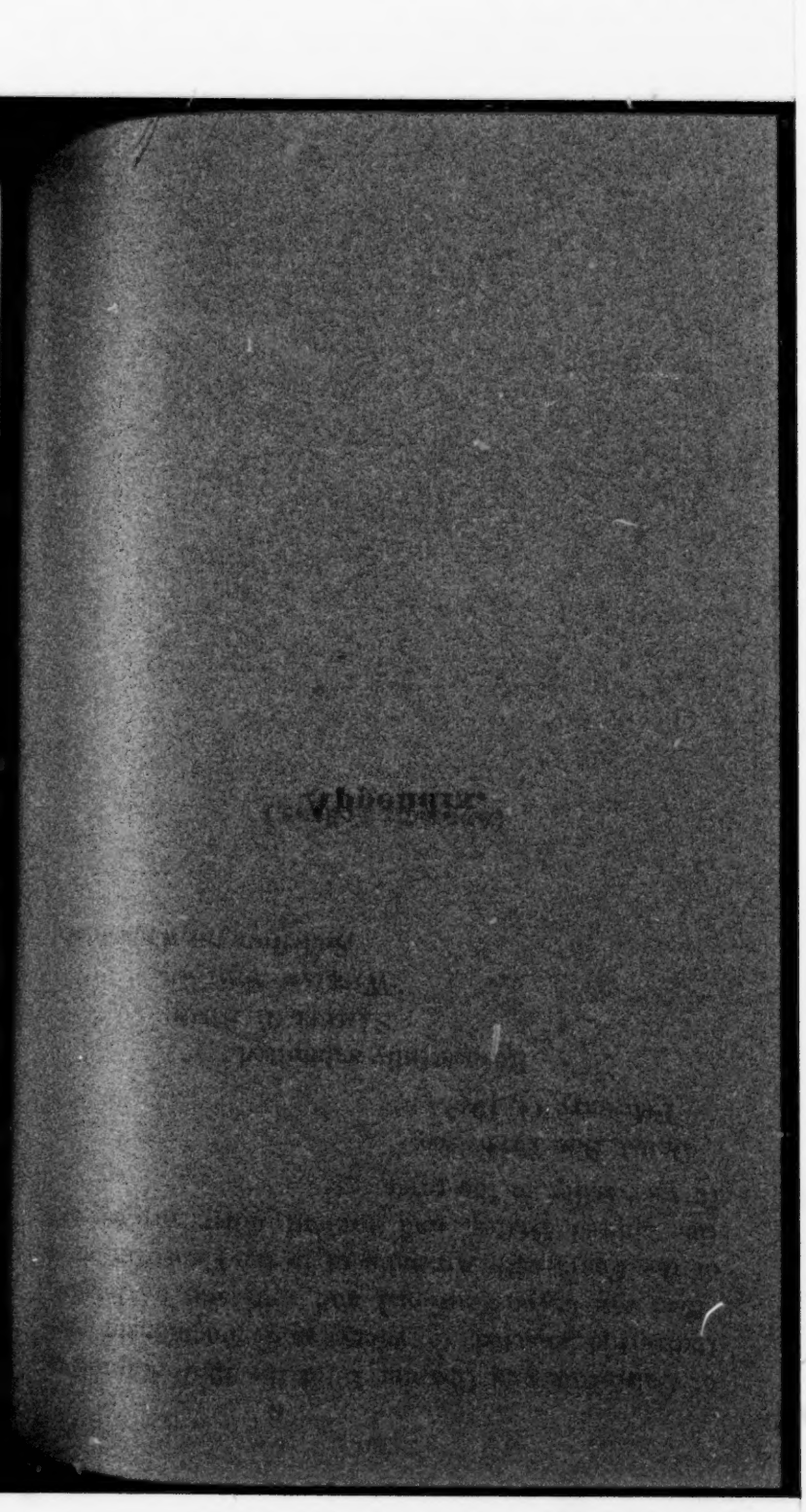
of California and Chapter 19 of the 1927 Statutes of California enacted to carry said amendment into effect are unconstitutional and void and a violation of the Fourteenth Amendment to the Constitution of the United States, and for all other proper and further relief in the premises.

Dated, San Francisco,
February 14, 1929.

Respectfully submitted,
SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Solicitors for Appellants.

(Appendix Follows.)

Appendix.



Appendix

(Chapter 412, p. 833, 1925 Statutes of California.)

An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the State of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purpose of this act; and to repeal all acts or parts of acts in conflict herewith.

[Approved by the Governor, May 23, 1925.]

The people of the State of California do enact as follows:

Section 1. The words and phrases used in this act shall for the purposes of this act, unless the same be contrary to or inconsistent with the context, be construed as follows:

(a) The phrase "railroad commission certificate" shall be construed to mean a certificate of public convenience and necessity granted or issued by the railroad commission of the State of California, authorizing a common carrier by motor vehicle to operate under the conditions prescribed by said commission, and shall also include all amendments to or changes in such certificate which may be made by said commission.

(b) The word "operator" shall include all persons, firms, associations and corporations who operate

motor vehicles upon any public highway in this state and thereby engage in the transportation of persons or property for hire or compensation, but shall not include any person, firm, association or corporation who solely transports by motor vehicle persons to and from or to or from attendance upon any public school or who solely transports his or its own property, or employees, or both, and who transports no persons or property for hire or compensation, but all persons operating freight carrying vehicles so exempted shall be required to obtain from the state board of equalization and to display exempt emblems in the manner hereinafter provided.

(c) The term "registration certificate" shall include any and all certificates of registration of a motor vehicle issued by the division of motor vehicles of the department of finance of the State of California, or by any governmental body within said state under which the laws of the said state may have power or authority to register and certify to the registration of a motor vehicle for operation within said state.

(d) The word "motor vehicles" shall mean and include all vehicles, automobiles, trucks or trailers operated upon or over public highways of this state whether the same be propelled or operated by steam or electricity, or propelled or operated by combustion of gasoline, distillate or other volatile and inflammable liquid fuels.

(e) The term "gross receipts from operation" shall include all receipts from the operation of such

motor vehicle or vehicles beginning and ending entirely within this state and a proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done of gross receipts by such operator on all business passing through, into or out of this state, or partly within and partly without this state, it being the intention hereof not to base all or any portion of the license fee hereby imposed upon any receipts from interstate commerce, or upon the right or privilege to engage in interstate commerce.

Sec. 2. Each operator of a motor vehicle within this state who transports or desires to transport for compensation or hire persons or property upon or over any public highway within the state shall apply to and secure from the board of equalization of the State of California a license to operate each and all of the motor vehicles which such operator desires to operate or which such operator from time to time may operate.

Sec. 3. Such license must be issued upon the filing with said board of a verified application by the applicant or his or its duly authorized agent in the form to be prescribed by said board. Said board shall transmit to the state controller each month a list of the operators of motor vehicles securing licenses from it under the provisions of this act, together with the amount of tax collectible from each operator.

Sec. 4. Within twenty days after the end of each quarter of the calendar year such applicant shall file with the state board of equalization a report upon forms to be provided by that board showing such

information relating to its operations as that board may require to enable it to make the assessment herein provided for, provided, that if any operator refuses or neglects to make the report herein required within twenty-five days after the close of any quarter, then the state board of equalization shall from its best information make an arbitrary assessment for such operator. If it shall appear from a report thereafter filed for such quarter that the arbitrary tax so fixed is in excess of the amount actually due then the state board of equalization shall be authorized to give such operator a credit upon his next quarterly report of a sum which will reduce such excess to not less than twenty-five per cent more than the amount actually found to be due, and such operator shall within thirty-five days after the end of each quarter pay to the state controller of the State of California an amount equal to four per cent of said applicant's gross receipts from operation derived by such applicant from the operation of such motor vehicles during the preceding quarter; provided, that there shall be deducted from said four per cent of the gross receipts the amount of any county or municipal licenses, and any city, or county or city and county taxes paid by such operators to any city, or county or city and county in this state upon any of the property actually used and necessary in the operation of such motor vehicles for the transporation of persons or property and upon such payment said state controller shall issue a receipt, in duplicate, to such applicant.

Sec. 5. Said board of equalization shall have the power and authority to prescribe the forms of all

reports of gross receipts from operation necessary to enable it or the state authorities to determine the amount and character thereof, and shall have power to subpoena witnesses duces tecum at any point within the State of California, and the state controller shall have the power to request the attorney general of said state to bring suit for the recovery of any unpaid license fee and costs. It shall be the duty of the attorney general to bring such suit on the written request of said state controller and in the name of said people of the State of California in a court of competent jurisdiction in the county of Sacramento; payment of an amount to said state controller for and on account of such license fee and the acceptance thereof shall not bar an action by the state to recover an additional amount for the same quarter which may actually be due. Any license holder may pay to the state controller all or any portion of the license fee hereby imposed under written protest and may bring an action against the state treasurer in his official capacity in the superior court of the State of California in and for the county of Sacramento, and obtain a judgment that said license fee has been in whole or in part illegally or unlawfully exacted or collected, and said judgment may be made the basis for an appropriation by the legislature of said state to reimburse said license holder, or his, or its, heirs, executors, successors, administrators or assigns, in the amount of said judgment without interest or costs.

Sec. 6. Upon the issuance of a license by said board of equalization to an operator of a motor vehicle or vehicles said board shall furnish to such operator

duplicate emblems or plates for each motor vehicle desired to be operated by such operator under such license, which emblems shall be attached to and conspicuously displayed upon each of the motor vehicles, authorized to be operated by said license, in the same manner as is required for motor vehicle registration license plates. Said emblems shall be numbered in pairs. Each pair shall bear a different number and said board shall keep a record of the emblems so issued, with the date of issuance, and the name of the operator to whom said emblems may be issued. Said board shall charge and collect from such operator the cost to the state of the manufacture and delivery to said board of such emblems and actual costs of mailing to licensee if not called for. There is hereby appropriated out of any moneys in the motor vehicle fuel fund, not otherwise appropriated, the sum of five thousand dollars for the purpose of designing, preparing and securing such emblems; said money to be expended by said board on warrants drawn in the manner provided by law, and said amount to be a revolving fund into which shall be paid from time to time as they are collected the amounts received from operators of motor vehicles for said emblems and the legislature may from time to time withdraw from said fund such amounts as it may deem proper; provided, that said fund shall not be decreased below the sum of five thousand dollars. There is also hereby appropriated out of said motor vehicle fuel fund the sum of twenty thousand dollars annually, or so much thereof as may be necessary, to be used by the state board of equalization to carry out the provisions of this act.

Sec. 7. Any person, firm, association, or corporation who shall use any public highway in this state for the transportation of persons or property for hire, either as a public or a private carrier, without first obtaining the license herein provided for, or without carrying upon each motor vehicle so used the emblems herein provided for, or who fails, neglects or refuses to make any return hereunder or any report required by the state board of equalization, or who makes any false return, and any person exempt from this tax who so neglects or refuses to obtain and display exempt emblems as required in subdivision (b) hereof, shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment. Any such operator of a motor vehicle who holds a California railroad commission certificate entitling him or it to operate as a common carrier and who fails, neglects or refuses for the period of thirty-five days from the end of any quarter of the calendar year to pay the license fee hereby imposed shall have his or its certificate revoked by said railroad commission, and it shall be mandatory upon said railroad commission to revoke said certificate upon written complaint to it by said board of equalization that said operator has for the period of thirty days failed, neglected or refused to pay such license fee, and said revocation shall be in addition to and independent of the penalty for misdemeanor herein prescribed; provided, that no such written complaint shall be made by such board until after notice by registered mail or personal service has been given

such operator and he has had an opportunity to be heard thereon. If any such operator of a motor vehicle shall fail, neglect or refuse for the period of thirty days next succeeding the end of any quarter of a calendar year to pay the license fee hereby imposed, the division of motor vehicles of the department of finance of the State of California shall upon written complaint of said board of equalization and upon ten days notice to such operator, suspend, until the payment of said license fee is made, any and all registration certificates held by such operator for any motor vehicles employed by him or it in the business of transportation of persons or property upon the highways of this state for hire.

Sec. 8. All sums paid to the state controller under and by virtue of this act, shall be deposited by him in the state treasury to the credit of the motor vehicle fuel fund, subject to the provisions of section six hereof and the balances thereof shall be applied and the same are hereby appropriated one-half to the State of California to be devoted exclusively to the maintenance and repair of public highways within this state; the remaining one-half shall be apportioned among the respective counties of this state, in the proportion that the number of motor vehicles registered within such county for the preceding calendar year bears to the total number of motor vehicles registered in the State of California under the motor vehicle act of such state for the preceding year and such sums so paid to said counties shall be devoted exclusively to the maintenance and repair of the public highways within such county; provided, that

from any sums found to be due to any county under the provisions of this act there shall first be deducted the total of all county and city licenses collected in such county from the operators covered by the provisions hereof and any county, and city and county or city taxes collected upon the operative property of such operators within such county. All such sums so deducted shall revert to the counties' portion of the motor vehicle fuel fund and shall be apportioned to the several counties in the proportion herein provided.

Sec. 9. This act shall not apply to hotel busses meeting trains or boats, nor to taxicabs, drays, transfer vehicles and other like city motor vehicles operating within incorporated cities or towns or the usual transfer delivery zone adjacent thereto, nor shall it apply to such vehicles operating between incorporated cities or towns where no portion of any state or county highway is traversed in said operation.

Sec. 9½. Nothing in this act shall be construed to apply to nor to levy a license upon that part of the gross income from the operation of any motor vehicle earned on account of carrying United States mail or parcels post under any contract with the United States government entered into prior to the first day of May nineteen hundred twenty-five.

Section 10. All acts and parts of acts in conflict herewith are hereby repealed; provided, however, that nothing herein shall be construed as affecting or repealing the provisions of an act entitled "An act providing for the supervision and regulation of the transportation of persons and property for compensa-

tion over any public highway by automobiles, jitney busses, auto trucks, stages and auto stages; defining transportation companies and providing for the supervision and regulation thereof by the railroad commission; providing for the enforcement of the provisions of this act and for the punishment of violations thereof; and, repealing all acts inconsistent with the provision of this act," approved May 10, 1917, as amended.

Sec. 11. An act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads, and highways in the State of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purposes of this act, and to repeal all acts or parts of acts in conflict herewith," approved June 13, 1923, is hereby repealed.

Sec. 12. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more of the sections, subsections, clauses or phrases be declared unconstitutional.

(Chapter 843, p. 1708, 1927 Statutes of California.)

An act to repeal that certain act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the State of California by motor vehicles; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purpose of this act; and to repeal all acts or parts of acts in conflict herewith," approved May 23, 1925.

(Approved by the Governor May 31, 1927.

In effect Jan. 1, 1928.)

The people of the State of California do enact as follows:

Section 1. An act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the State of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purpose of this act; and to repeal all acts or parts of acts in conflict herewith," approved May 23, 1925, is hereby repealed.

Sec. 2. This act shall become effective on the first day of January in the year 1928.

(Chapter 60, p. 1386, 1925 Statutes of California.)

Assembly Constitutional Amendment No. 37—Proposed amendment to article thirteen of the constitution, relative to taxation.

(Adopted by vote of the people at regular state election, November 2, 1926.)

(Filed with Secretary of State April 27, 1925.)

Resolved by the assembly, the senate concurring, That the legislature of the State of California, at its forty-sixth regular session commencing on the fifth day of January, one thousand nine hundred and twenty-five, two-thirds of all the members elected to each of the two houses of said legislature voting in favor thereof, hereby proposes to the people of the State of California that a new section to be called section fifteen is hereby added to article thirteen of the constitution of the State of California, said section to read as follows:

Sec. 15. Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school districts, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word "com-

panies," as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state.

When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; provided, that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state.

The revenues from the taxes provided for in this section shall be deposited in the general fund and shall be applied and the same are hereby appropriated one-half to the State of California to be devoted exclusively to the maintenance and repair of public highways within this state; the remaining one-half shall be apportioned among the respective counties of this state, in the proportion that the number of motor vehicles registered within such county for the preceding calendar year to the total number of motor vehicles registered in the State of California under the motor vehicle act of such state for the preceding year, and such sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within such county. In the event that all other state revenues are at any time deemed insufficient to meet the annual expenditures of the state, there may be levied in the manner to be provided by law, a tax, for state purposes, on all the property in the state, including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded

indebtedness created and outstanding by any city, city and county, county, town, township, or district on the first day of October, one thousand nine hundred twenty-five. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes hereunder.

(b) All the provisions of this section shall be self-executing, and the legislature shall pass all laws necessary to carry this section into effect, and shall provide for the valuation and assessment of the property enumerated in this section, and shall prescribe the duties of the state board of equalization and any other officers in connection with the administration thereof.

The rates of taxation fixed in this section shall remain in force until changed by the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section.

(c) No injunction shall ever issue in any suit, action or proceeding in any court against this state or against any officer thereof to prevent or enjoin the

collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such a manner and at such time as may now or hereafter be provided by law.

(Chapter 19, p. 17, 1927 Statutes of California.)

An act to add three new sections to the Political Code to be numbered three thousand six hundred sixty-four aa, three thousand six hundred seventy bb and three thousand six hundred seventy cc, relating to taxation of highway transportation companies for state purposes.

(Approved by the Governor March 5, 1927.
In effect immediately.)

The people of the State of California do enact as follows:

Section 1. A new section is hereby added to the Political Code to be numbered 3664aa, to read as follows:

3664aa. 1. Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district shall be entirely and exclusively for highway purposes, and shall be assessed and levied by the state

board of equalization and collected in the manner hereinafter provided. The word "companies," as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

2. All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

3. All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks, or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state.

4. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

5. Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; *provided,* that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state.

6. The provisions of sections 3664e, 3665a, 3665b, 3665c, 3666, 3666c, 3667a, 3667b, 3667c, 3668, 3668a, 3668b, 3668c, subdivisions two, three and four of section 3669, 3669a, 3669b, 3669c and 3669e of the Political Code and any amendments thereto hereafter made, shall apply, and shall be construed to apply, to all "companies" subject to state taxation under section 15 of article XIII of the constitution of this state, with the same force and effect as if said companies were expressly mentioned in said sections of the Political Code.

Sec. 2. A new section is hereby added to the Political Code to be numbered 3670bb, said section to read as follows:

3670bb. 1. Each county, city and county, city and district assessor must segregate on his assessment roll, as directed by the state board of equalization, the assessments made by said assessors of all property enumerated in section 15 of article XIII of the constitution of this state, which is located in the county, or city and county, or any city, town, township, or district in which it is subject to taxation, for paying the principal and interest of any bonded indebtedness

created and outstanding by any city, city and county, county, town, township or district prior to the second day of October in the year 1925, as provided in section 15 of article XIII of the constitution of this state.

2. Immediately upon completion of the assessment and equalization of property for the purposes of taxation in each year, the auditor or clerk of each county, city and county, city, town, or district must transmit to the state board of equalization a duplicate of that part of the assessment roll containing the assessments referred to in subdivision one of this section.

3. Whenever the state board of equalization is satisfied after investigation that any county, city, or other assessor, or board of equalization, has assessed for taxation to pay the principal and interest of any bonded indebtedness created and outstanding by any county, city and county, city, town, township, or district prior to the second day of October in the year 1925, as provided in section 15 of article XIII of the constitution of this state, any of the property taxed exclusively for state purposes as provided in said section, above its full cash value and has thereby unjustly reduced the amount of taxes due the state on such property, said state board shall, under such rules of notice to the clerk of the board of supervisors of the county, or city and county, or to the city clerk of the city affected thereby, as the board shall deem reasonable, equalize the assessed value of such property, and shall issue an order to said assessor or board of equalization and to the county or city auditor or clerk of the county, city and county, or city in which

the property is located, fixing the assessed value of such property.

4. The value so equalized and no other, shall be deemed the value of said property, and its assessment for taxes levied to pay the principal and interest of any such outstanding bonded indebtedness.

5. When making the tax levy and fixing the rates of taxation for county, city and county, city, town, township, or district purposes, the board of supervisors of any county, or city and county and the corresponding authority in any city having bonded indebtedness issued and outstanding on the first day of October in the year 1925, shall fix the tax rate for such bonded indebtedness separate and apart from all other tax rates whether for subsequent bonded indebtedness or for other purposes.

6. The county, city and county, or city auditor or clerk shall extend on the assessment roll against the assessments segregated as herein provided, the taxes necessary to pay the principal and interest of said bonded indebtedness at the same rate as said taxes for payment of principal and interest of said outstanding bonded indebtedness shall be levied upon the other classes of property within the same county, city and county, city, town, township or district, and the amount of each such taxes shall be certified by said auditor or clerk to the controller, and the amount so certified shall then be credited by the controller to the county, city and county, city, town, township or district to which it is due; and said amount shall be paid by said controller to the treasurer of such county,

or city and county, as provided in section 3670cc of this code, and upon such payment said treasurer shall forthwith certify such fact to the auditor who shall thereupon mark upon the assessment roll the date of payment and the words "paid by the state treasurer." The city clerk or auditor shall in the certificate mentioned in this paragraph also state the date when taxes in such city shall become delinquent.

Sec. 3. A new section is hereby added to the Political Code to be numbered 3670cc, said section to read as follows:

3670cc. 1. All taxes assessed and levied under the provisions of section 15 of article XIII of the constitution of this state and sections of this code applicable thereto shall be paid to the state treasurer, upon the order of the controller, without deduction for any taxes assessed and levied to pay the principal and interest of any bonded indebtedness mentioned in section 15 of article XIII of the constitution of this state, and the amount due to the cities, cities and counties, counties, towns, townships and districts, on account of said taxes assessed and levied for such bonded indebtedness shall be paid to said cities, cities and counties, counties, towns, townships or districts, in the manner provided by law. The controller must mark the date of payment of any tax on the record of assessments for state taxes.

2. The controller, out of the taxes collected by him under the provisions of section 15 of article XIII of the constitution of this state and the provisions of the sections of this code applicable thereto, shall credit

to the fund created by an act of the thirty-ninth session of the legislature entitled: "An act appropriating money for the purpose of payment of that part of the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district on the eighth day of November in the year 1910, which is provided for in section 14 of article XIII of the constitution of this state, and as provided in an act of the thirty-ninth session of the legislature entitled: 'An act to carry into effect the provisions of section 14 of article XIII of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation and providing for the taxation of public service and other corporations for the benefit of the state, all relating to revenue and taxation,'" or any act or acts amendatory thereof or supplementary thereto, the money due to each county, city and county, city, town, township or district on account of taxes to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, on the first day of October in the year 1925.

3. The controller, in the months of October and March in each year shall settle with the treasurer of each county and city and county for the money collected by said controller under this section, for the moneys due said county or city and county and the townships and districts within such county, or city and county, in the same manner as settlements are

made between the county or city and county treasurers and the controller as provided for in section 3866 of this code.

4. The controller shall settle, at the same times, with each city and town for the moneys due such city or town for the purposes mentioned in this section, and when ready for such settlement shall notify the city or town treasurer of the amount of money due the city or town for said purposes, and that upon receipt of proper authority so to do, he will forward to said city or town treasurer a warrant for the amount thereof; *provided, however,* that upon receipt of notice from any such city or town treasurer that any bond issue matures for principal or interest before the date of such settlement, which notice shall state the amount thereof due from the state, and the date of maturity, and that said amount due from the state is required in order to pay the same, the said state controller must, before said date of maturity, forward his warrant to such city or town treasurer in the manner above provided for the amount ascertained by him to be due. The treasurer of the county or city and county shall forthwith, upon receipt by him of the moneys so hereinbefore directed to be paid by said controller, credit the amount so received by him to the county, city and county, township or district, respectively entitled thereto, and pay the same in the manner provided by law.

5. Any excess paid by the controller to a county, city and county, city, town, or to a county or city and county or any township or district, over and above the

state's share of the amount actually expended by such county, city and county, city, town, township or district, to pay the interest and principal of said bonded indebtedness in any year, shall be repaid to the state in such manner as the controller shall direct.

Sec. 4. This act, inasmuch as it provides for a tax levy, shall, under the provisions of section 1 of article IV of the constitution, take effect immediately.

Due service and receipt of a copy of the within is hereby admitted

this _____ day of February, 1970.

_____

Attorney for Respondent

_____

Deputy Attorney General of the State of California,
Solicitors for Appellant

FILE COPY

FILED
APR 13 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. [redacted] 13

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,
Appellee.

REPLY BRIEF FOR APPELLANTS.

SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Standard Oil Building, San Francisco,
Solicitors for Appellants.

[redacted] PRINTING CO., SAN FRANCISCO

Table of Authorities and Statutes Cited

	Pages
Constitution of the State of California, Art. I, Sec. 11....	2
Dane v. Jackson, 256 U. S. 589.....	10
Frost v. Railroad Commission, 271 U. S. 583.....4, 5, 7, 8	
Iowa Motor Vehicle Association v. Board of Railroad Commissioners, 221 N. W. 364.....	9, 10
Liberty Highway Co. v. Michigan Public Utilities Commission, 294 Fed. 703.....	8, 9
Michigan Public Utilities Commission v. Duke, 266 U. S. 570	5, 9
Michigan Telephone Tax Cases, 229 U. S. 322.....	10
Oliver Iron Mining Co. v. Lord, 262 U. S. 172.....	2
Public Acts of Michigan, 1923, Act 209.....	8
Schlesinger v. Wisconsin, 270 U. S. 230.....	2
Statutes of California, 1927, Chapter 844.....	1
Western Association of Short Line Railroads v. Railroad Commission	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 530

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,
Appellee.

REPLY BRIEF FOR APPELLANTS.

The appellee, in his brief, refers to an additional weight fee imposed upon motor vehicles used in the transportation of property provided for by Chapter 844, Statutes of 1927, which went into effect January 1, 1929. (Page 28 of Appendix to Appellee's Brief.) He does not contend that this additional weight fee is an equivalent or an approximate equivalent for the five per cent gross receipts tax; nor could he seriously do so, as the fee ranges from a minimum of $20 per

annum to a maximum of $70 per annum, for gasoline propelled vehicles, according to weight of the vehicle, and it is not considered as a tax, but is designated as a "registration fee," nor does it apply to any trucks weighing less than 3000 pounds, unless they be propelled by electric motor. Compared to five per cent of the average annual gross earnings of a motor truck used in the transportation of property for hire, even the maximum fee of $70 would be a very small fraction of the tax.

Appellee argues in his brief that "common carriers operating for compensation over particular routes are not unlike railroads which traverse the same path between definite points, and this Court has held that railroads constitute a class whose property may be taxed differently and whose property may be taxed additionally, if the state constitution does not require equality in the matter of tax burden." California does require equality in the matter of tax burden for those *similarly situated,* as does also the federal constitution.

"All laws of a general nature shall have a uniform operation."

Constitution of California, Art. I, Sec. 11;
5 *Cal. Jur.* p. 816, Sec. 184;
Oliver Iron Mining Co. v. Lord, 262 U. S. 172;
Schlesinger v. Wisconsin, 270 U. S. 230.

Neither is the quoted analogy appropriate; for the reason that if a railroad operating the same path between definite points transported property for hire under contract with certain shippers to the exclusion of the general public, it would still be a railroad and

would be properly classified as a railroad for tax purposes. The meat of our contention that the legislation in question is discriminatory lies in the point that while common carriers transporting property for hire are subject to the tax, contract carriers for hire transporting property are not subject thereto, nor to any equivalent tax; both types of carriers use the highways to earn a livelihood in the same manner, using the same sort of vehicles, parallel each other and are in direct competition with each other and their vehicles effect the same wear and tear on the highways. So when it is contemplated that the tax in question is devoted exclusively to the maintenance and repair of the highways all of the arguments and authorities cited by appellee are not relevant or in point. In none of the cases so cited is authority found for discriminating, in a tax exclusively for highway purposes, between common carriers operating for hire between fixed termini or over regular routes and contract carriers operating for hire between like termini or routes. When it is also considered that contract carriers so operating can not be controlled as a public utility, like common carriers, the reason is doubly persuasive that such control should and could, in a measure, be exercised in the interest of preventing unfair competition with regulated common carriers by a heavy gross receipts tax, such as the tax in question. What the State of California has attempted to do in an unlawful manner, it has failed and neglected to do in a lawful manner. In other words, it attempted to impress upon contract carriers for hire, operating between fixed termini or over regular routes, the status

of common carriers, for the purpose of *regulating the business* of such contract carriers. This Court held that a classification with common carriers for such purpose, could not be effected. *(Frost v. Railroad Commission,* 271 U. S. 583.) But we submit that a like classification for the purpose of levying a tax for the *privilege of use* of the highways *as a business,* would be not only a reasonable and constitutional classification but would save the regulated common carriers from the demoralization of their business now imminent. (Bill of Complaint, paragraphs IX, X, XII; R. pp. 9-11.)

That this situation is recognized by the courts of California is evidenced by *Western Association of Short Line Railroads v. Railroad Commission,* 173 Cal. 802, quoted at page 14 of appellee's brief, a portion of which we are requoting from said brief as follows:

> "And, moreover, it is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of whose revenues goes by way of taxes to the support of the state."
>
> (See also quotations from *Frost v. Railroad Commission,* 197 Cal. 230, Appellants' Opening Brief p. 26.)

The State of Michigan likewise recognized that contract carriers and common carriers operating between fixed termini or over regular routes are similarly situated and attempted to classify the former with the latter as public utilities, but, as was said in the *Frost* case, *supra,* this Court held in *Michigan Public Util-*

ities Commission v. Duke, 266 U. S. 570, that contract carriers can not arbitrarily be impressed with the status of common carriers for such purpose. This Court intimates in the *Frost* case (271 U. S., at page 591) that a classification regulating the *use* of the public highways could have included the contract carriers operating between fixed termini or over regular routes with the common carriers so operating, but that legislation could not arbitrarily classify them for the purpose of regulating or controlling the *business* of such contract carriers, for it there states:

> "It is very clear that the act as thus applied is in no real sense a regulation of the *use* of the public highways. It is a regulation of the *business* of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of highways is not involved. This, in effect, is the view of the Court below plainly expressed."

THE APPELLANTS CAN NOT BE DEPRIVED OF A CONSTITUTIONAL RIGHT AS THE CONDITION OF ENJOYING A PRIVILEGE.

The appellee argues, and cites authority in support of the argument, that the appellants having voluntarily accepted the alleged benefits of being classified as common carriers subject to the regulation and control of the Railroad Commission can not now complain of the discrimination in taxation. Our answer is that some of these appellants were operating as common carriers between fixed termini or over regular routes before the year 1917, when the State Railroad Com-

mission was first given control of their operations; also that some of the appellants were not always operating between fixed termini or over regular routes when they were notified by the Railroad Commission that they would have to submit to its jurisdiction or be prosecuted under the Auto Stage and Truck Transportation Act. Whether a carrier operates between fixed termini or over regular routes is a question of fact to be conclusively determined by the Railroad Commission, and is not subject to review. (Sec. 1 (e), Appellee's Brief, p. 33.) Some of the appellants found themselves in a position where they were obliged, in order to retain their more profitable business, to give up some of their business not obtained over regular routes or between fixed termini, and submit to the jurisdiction of the Railroad Commission. We submit that such action was not entirely free and voluntary on the part of such appellants; furthermore, that the alleged advantages specified in page 10 of appellee's brief, namely: "power to fix their rates, fares, charges, classifications, rules and regulations, power to regulate their accounts, service and safety of operations, and, in general, power in all other matters affecting the relationship between such companies and the traveling public," because of the free and unrestricted competition of the contract carriers not subject to the severe and heavy taxation involved in this litigation, have proven a restraint, burden and restriction upon the free and equal competition of the appellants, and have been a handicap rather than a benefit to them. (See report of California State Board

of Equalization, quoted at page 28 of Appellant's Opening Brief.)

In other words, appellee contends that because appellants enjoy the privileges of a common carrier operating between fixed termini or over regular routes and the privilege of being regulated by the State Railroad Commission, the appellants should not complain if they are subjected to a discriminatory or unconstitutional tax. The language of this Court used in the *Frost* case is an extremely appropriate answer to such a situation. That answer, quoting from the text of that decision, is as follows:

> "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, —an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which constitutes an intolerable burden.
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same results are accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guar-

anties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost v. Railroad Commission,* 271 U. S. 593-594, 70 L. Ed. 1104, 1105, (and numerous cases quoted therein in support of the text).

The appellee relies on the case of *Liberty Highway Co. v. Michigan Public Utilities Commission,* 294 Fed. 703, and quotes from the text of that decision as tending to support the reasonableness of the classification affecting common carriers engaged in the business of transporting persons or property for hire upon the public highways over fixed routes or between fixed termini. That decision rests upon Act 209 of the Public Acts of Michigan of 1923. That act provides that no person, firm or corporation shall engage or continue in the business of transporting persons or property by motor vehicle, for hire, over the public highways of the state, over fixed routes or between fixed termini, unless they shall have obtained a permit from the Michigan Public Utilities Commission.

Section 3 of said Michigan act makes all of such carriers common carriers and it therefore includes within its definition contract carriers operating between fixed termini or over regular routes, as well as common-law common carriers. In other words, it includes all of the same class within one classification for the purpose of regulating their business as public utilities. That case was decided December 15, 1923, and that act, like the Auto Stage and Truck Transportation Act of California, was later held by this Court to be unconstitutional in the case of *Michigan Public*

Utilities Commission v. Duke, supra, for the reason that it attempted by legislative fiat to convert a private or contract carrier into a common carrier. The reasoning of the *Liberty Highway Co.* case therefore supports the contention of the appellants that contract carriers and common carriers for hire, using the public highways as a business should be properly classed as one group in any measure for taxation purposes or other purposes that affect the *use* of the highways.

The appellee likewise relies upon the case of *Iowa Motor Vehicle Association v. Board of Railroad Commissioners,* 221 N. W. 364, and quotes extensively at pages 17, 18 and 19 of his brief from the text of that decision, in support of the proposition that a classification of common carriers operating between fixed termini or over regular routes is constitutional. But a reading of the statute of the State of Iowa, as quoted in the decision, indicates that the tax there applied was not limited to common carriers. The tax under that statute is a per ton mile tax and is applicable to certain motor vehicles as defined by the act there construed. Section 1 of said act provides:

> "The term 'motor vehicle' shall mean any automobile, automobile truck, motorbus, or other self-propelled vehicle, not operated upon fixed rails or tracks, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route," etc.

It will thus be seen that the tax was also made applicable to motor vehicles operating under contract between fixed termini or over regular routes, for hire. Furthermore, the Iowa Supreme Court clearly shows the basis of its decision in the following language:

> "The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of living and business is radically different from that of one who makes a certain portion of the highway his place of business and uses it for private gain in the transportation of freight or passengers as under the terms of the statute in question."
>
> *Iowa Motor Vehicle Association v. Board of Railroad Commissioners,* 221 N. W. 364, 369.

The appellants do not complain or contend that they are deprived of their property without due process of law because of the severity of the tax burden alone, but they contend that because of the discriminatory nature of the tax coupled with its severity the two elements combined permit a condition of such unfair competition by those contract carriers who are neither subject to regulation by the Railroad Commission nor to the payment of the tax, that it amounts to a flagrant and palpable inequality between the burden imposed and the benefits received as to constitute the arbitrary taking over of property without compensation, or in other words "to spoliation under the guise of exerting the power of taxing."

Dane v. Jackson, 256 U. S. 589, 599;

The Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322, 335.

Bill of Complaint, p. VIII, IX, X, XI, XII, XV, R. pp. 9, 10, 11, 12.

We submit, therefore, that the decree of the lower Court denying the motion for an interlocutory injunction, granting the motion to dismiss the bill of complaint and upholding the constitutionality of Section

15, Article XIII, of the State Constitution and the enabling legislation should be reversed.

Dated, San Francisco,
April 6, 1929.

Respectfully submitted,
SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Solicitors for Appellants.

Due service and receipt of a copy of the within is hereby admitted

this ..... *day of April, 1929.*

.....

Attorney General of the State of California,

.....

Deputy Attorney General of the State of California,

Solicitors for Appellee.

FILE COPY

RECEIVED
MAR 19 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 530. 13

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as BAY CITY HAULING CO.; KENNETH C. CLARK et al.,

Appellants,

vs.

RAY L. RILEY, as Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

U. S. WEBB,
Attorney General of the State of California,

FRANK L. GUERENA,
Deputy Attorney General,
640 State Building,
San Francisco, California,
Attorneys for Appellee.

66055 CALIFORNIA STATE PRINTING OFFICE

SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
THE STATE TAX SYSTEM IN GENERAL	4
SECTION 15 OF ARTICLE XIII OF THE CALIFORNIA CONSTITUTION DOES NOT DENY THE EQUAL PROTECTION OF THE LAWS	8
SECTION 15 OF ARTICLE XIII OF THE CALIFORNIA CONSTITUTION DOES NOT DEPRIVE APPELLANTS OF DUE PROCESS OF LAW	24
CONCLUSION	27
APPENDIX	28

TABLE OF CASES CITED

	Page
Application of Ben Moore, 27 C. R. C. 388	22
Application of J. W. Ritzman, 31 C. R. C. 773	22
Bacon Service Corp. vs. Huss, 199 Cal. 21	6
Bacon Service Corp. vs. Huss, 72 L. Ed. 224; 48 S. Ct. 158	6
Bank of California vs. Richardson, 248 U. S. 476	5
Bank of California vs. Roberts, 248 U. S. 497	5
Barbour vs. Walker, 259 Pac. 552	19
Bells Gap Rd. Co. vs. Pa., 134 U. S. 232	27
Coronado Transfer Co. vs. United Parcel Service of San Diego, 31 C. R. C. 208	22
Dane vs. Jackson, 256 U. S. 589, 599	25
Fish Bros. Co. vs. Brown, 146 N. E. 100 (103)	19
Frost vs. Railroad Com., 271 U. S. 583	9
Frost vs. Railroad Com., 197 Cal. 230	13
Hartford Fire Ins. Co. vs. Jordan, 168 Cal. 270	5
Henderson Bridge Co. vs. Henderson, 173 U. S. 592	27
Hendrick vs. Maryland, 235 U. S. 610 (632)	24
Hopkins vs. Southern Calif. Tel. Co. et al., 48 S. Ct. 180	5
In re Schmolke, 199 Cal. 42	6
Iowa Vehicle Asso. vs. Board of Railroad Commissioners, 221 N. W. 364 (367)	17
Liberty Highway Co. vs. Michigan Public Utilities Com., 294 Fed. 703	16
Louisville Gas and Electric Co. vs. Coleman, 48 S. Ct. 423	24
Matter of Schuler, 167 Cal. 282	19
Matter of Stork, 167 Cal. 294	19
McCulloch vs. Maryland, 4 Wheat. 315	26
Michigan Public Utilities Com. vs. Duke, 266 U. S. 570; 45 S. Ct. 191	15
Morris vs. Duby, 274 U. S. 135, 47 S. Ct. 548	24

TABLE OF CASES CITED—Continued

	Page
Northwest Auto Co. vs. Hurlburt, 207 Pac. 161 (164)	19
Old Homestead Bakery vs. Marsh, 75 Cal. App. 247	19
Pacific Gas & Elec. Co. vs. Roberts, 168 Cal. 420	5
Pacific Gas & Elec. Co. vs. Roberts, 176 Cal. 183	5
Packard vs. Banton, 264 U. S. 140, 44 S. Ct. 257	15
Petaluma & Santa Rosa Ry. Co. vs. Deysar, 32 C. R. C. 141	22
Pullman Co. vs. Richardson, 185 Cal. 484	5
Pullman Co. vs. Richardson, 261 U. S. 330, 43 S. Ct. 366	5
Quaker City Cab Co. vs. Pennsylvania, 72 L. Ed. 609	22
Raymond vs. Holm, 206 N. W. 166	20
San Francisco vs. Pacific Tel. & Tel. Co. 166 Cal. 244	5
Sanger vs. Lukens, 24 Fed. (2d) 226	15
Schmolke vs. O'Brien, 273 U. S. 646	6
Schwab vs. Richardson, 263 U. S. 88	5
Smallwood vs. Jeter, 244 Pac. 149 (155)	15
Southern Pacific Co. vs. Levee District No. 1, 172 Cal. 345	5
Southern Railroad Co. vs. Watts, 260 U. S. 519; 43 S. Ct. 192	13
State vs. Lefebvre, 219 N. W. 167	19
State vs. Oligney, 202 N. W. 893	19
State vs. Peterson, 198 N. W. 1011	19
State Tax on Foreign Held Bonds, 15 Wall. 300	26
The Michigan Telephone Tax Cases, 185 Fed. 634; 229 U. S. 322	25
Thornewell vs. Gregory, 31 C. R. C. 843	22
Volume 26, R. C. L., par. 63	26
Wagner vs. Baltimore, 239 U. S. 207	27
Weimar Storage Co. vs. Dill, 143 Atl. 438	22
Western Association of Short Line Railroads vs. Railroad Commission, 173 Cal. 802	14
Willis vs. Buck, 263 Pac. 982	19

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1928.

No. 530.

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as BAY CITY HAULING CO.; KENNETH C. CLARK et al.,

Appellants,

vs.

RAY L. RILEY, as Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

This is a proceeding in equity in which the appellants, who operate motor trucks in the transportation of freight for compensation upon the public highways in the State of California as common carriers between fixed termini and over regular routes, seek to have the state enjoined from collecting a property tax which has been levied against appellants' opera-

tive property, pursuant to the provisions of the state law, for the year 1928.

The theory of suit is that the state law is discriminatory and confiscatory in violation of the due process of law and equal protection of the law clauses of the fourteenth amendment to the federal constitution.

Sitting under section 266 of the Judicial Code, the lower court denied injunctive relief and granted a motion to dismiss the bill of complaint.

STATEMENT OF THE CASE

Under section 15 of article XIII of the constitution of California property exclusively used by a person or company in the operation of the business of transporting property or persons as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route is taxable by the state, for state purposes, in an amount computed at a percentage of its gross receipts from operation. The percentage is five (5) per cent in the case of a freight carrier and four and one-quarter (4¼) per cent in the case of a passenger carrier. The state tax is in lieu of all other taxes and licenses, state, county and municipal, upon that property. The text of that section is set forth in full on pages XII to XVI, inclusive, of the appendix to appellants' brief.

The bill of complaint alleges that appellants were freight carriers of the class described in said sec-

tion (Tr. p. 3). It alleges that the operative property of appellants was levied upon by the state pursuant to the terms of that section, and enabling statutory legislation (Tr. p. 11), and prays that the state be enjoined from enforcing collection of the taxes so levied (Tr. p. 14).

The bill of complaint charges that section 15 of article XIII of the constitution of California offends against the equal protection of the laws clause in that the section does not apply to

(1) Contract or private carriers operating for hire between fixed termini or over regular routes upon the public highways;

(2) Contract or private carriers operating over the public highways, but not between fixed termini or over regular routes; and

(3) Common carriers for hire operating over the public highways, but not between fixed termini or over regular routes.

In their brief on this appeal, but not in the bill of complaint, appellants for the first time allege that said section denies them equal protection of the laws in that it discriminates illegally between carriers of freight and carriers of passengers in the matter of said percentages (p. 19).

The bill of complaint charges that section 15 of article XIII of the constitution of the State of California contravenes the due process of law clause in that

(1) Appellants have a tax burden under that section four times as heavy as the tax burden

borne by those carriers in whose favor it is claimed the section unjustly discriminates;

(2) The carriers, above referred to, excluded from the operation of said section, pay state and local taxes aggregating not more than five (5) per cent of the full value of property used by them exclusively in the operation of their business.

Upon the application for the interlocutory injunction the appellee relied solely upon the first ground of his motion to dismiss the bill of complaint, a general demurrer, and upon this appeal the appellee directs his reply to the merits of the proceeding, abandoning the other grounds set forth in said motion.

ARGUMENT

(1) The State Tax System in General.

In November, 1910, by constitutional amendment, adding section 14 to article XIII, the people of California adopted a tax system separating the sources of state and local taxation, departing from their original plan of taxing all property in proportion to its value. As a result of that change certain public utilities operating within and without the state were taxed upon their operative property at a percentage of their gross receipts from operation on business done in California. The state taxes on utilities, measured by their gross receipts from operation, have repeatedly been held by the Supreme Court of California to be property taxes and not taxes upon income.

San Francisco vs. *Pacific Telephone and Telegraph Co.*, 166 Cal. 244;
Pacific Gas & Electric Co. vs. *Roberts*, 168 Cal. 420;
Pacific Gas and Electric Co. vs. *Roberts*, 176 Cal. 183;
Southern Pacific Co. vs. *Levee District No. 1*, 172 Cal. 345;
Pullman Co. vs. *Richardson*, 185 Cal. 484;
Hartford Fire Ins. Co. vs. *Jordan*, 168 Cal. 270.

The system established by this amendment of 1910, as it affects car companies, telephone companies, banks and corporate excess, has been before this court in the cases of

The Pullman Company vs. *Richardson*, 261 U. S. 330, 43 S. Ct. 366;
Hopkins vs. *Southern California Telephone Co., et al.*, 48 S. Ct. 180;
Bank of California vs. *Richardson*, 248 U. S. 476;
Bank of California vs. *Roberts*, 248 U. S. 497;
Schwab vs. *Richardson*, 263 U. S. 88.

The amendment of 1910 did not subject motor carriers, or their operative property, to state taxation. They remained subject to local property and license taxes. In 1913, the legislature of California enacted the first Motor Vehicle Act. (Stats. of 1913, p. 639.) It has been superseded by the California Vehicle Act of 1923 (Stats. 1923, p. 517), as amended in 1925 (Stats. 1925, p. 398) and in 1927 (Stats. 1927, p. 1421).

In 1923, the legislature of California enacted a Motor Vehicle Transportation License Act imposing upon all persons and companies operating motor vehicles upon the public highways in the transportation of persons or property for hire a license fee in an amount computed at four (4) per cent of the gross receipts from operation, with a deduction of the aggregate amount of county and municipal taxes and licenses. The constitutionality of that act, tested by the equal protection of the laws clause, was declared in

Bacon Service Corporation vs. *Huss,* 199 Cal. 21,

and this court denied a writ of *certiorari.*

Bacon Service Corporation vs. *Huss,* 72 L. Ed. 224, 48 S. Ct. 158.

The Motor Vehicle Transportation License Act of 1923 was replaced by a similar act in 1925 (Stats. 1925, p. 833), the full text thereof appearing on pages I to XI of the appendix to appellants' brief. That act was upheld, against an attack based on the equal protection of the laws clause, by the State Supreme Court

In re Schmolke, 199 Cal. 42,

and a writ of *certiorari* denied by this court.

Schmolke vs. *O'Brien,* 273 U. S. 646.

Further pursuing the new plan established in 1910, the people of California in 1926 ratified an initiative measure adding section 15 to article XIII of the con-

stitution. The language of that section and its purpose is essentially the same as the language and purpose of section 14 of the same article, which deals with state taxation, by the gross receipts from operation method, of car companies, telephone companies and other utilities, but no appellate court in California has had occasion to determine any question, state or federal, with respect to section 15. The effect of the "in lieu" clause in section 15 was to remove from the operation of the Motor Vehicle Transportation License Act of 1925 motor carriers of the class described in section 15, but in 1927 that act was repealed (Stats. 1927, p. 1708) as of January 1, 1928.

For the purpose of collecting revenue for the state from those motor carriers who had been subject to the Motor Vehicle Transportation License Act of 1925 but who were not subject to the constitutional amendment of 1926 (Sec. 15 of Art. XIII), the legislature of California in 1927 amended sections 77 and 78 of the California Vehicle Act of 1923 by increasing the weight fees upon motor vehicles designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, over the public highways. The amendment was subjected to a referendum and therefore did not go into effect on January 1, 1928, as was intended by its proponents. The amendment appeared on the general state election ballot on November 6, 1928, and the referendum was defeated, the amendment going into effect on January 1, 1929. Sections 77 and 78 of the

California Vehicle Act are set forth in full in the appendix hereto.

It is expressly declared in said section 78 that the fees prescribed in said section 77 shall not apply to motor carriers of the class described in section 15 of article XIII of the California constitution.

Both common and contract motor carriers who do not operate between fixed termini or over a regular route, though not within the scope of section 15 of article XIII, are obligated to pay the state registration and weight fees required to be paid by the California Vehicle Act and such property taxes and local excises as may be imposed by counties, cities and other political subdivisions of the state.

(2) Section 15 of Article XIII of the California Constitution Does Not Deny the Equal Protection of the Laws.

The power of a state to classify property for the purpose of taxation, of course, is not disputed. The legal test by which the validity of the classification is determined is so clearly established and so generally understood that the parties hereto are not in disagreement in that regard. The sole issue is whether the classification created by section 15 of article XIII of the California constitution meets that test.

Section 22 of article XII of the constitution of California creates a so-called Railroad Commission, which would more properly be termed a public utility

commission for its jurisdiction is not confined to railroads, and it empowers that body

> "to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies * * *."

Section 23 of article XII of the constitution of California declares that "every common carrier" is a "public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature," and it gives to the commission such power to regulate public utilities and to fix their rates as the legislature of California may prescribe.

Pursuant to the terms of the aforesaid constitutional provisions the legislature of California enacted in 1917 the so-called "Auto Stage and Truck Transportation Act" (Stats. 1917, p. 330), the full text appearing in the appendix hereto. That act was before this court in the case of

Frost vs. *Railroad Commission,* 271 U. S. 583.

The said act of 1917 defines a "transportation company" as follows:

> "The term 'transportation company,' when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or *as a common carrier,* for compensa-

tion, over any public highway in this state *between fixed termini or over a regular route,* and not operating exclusively within the limits of an incorporated city or town or of a city and county; provided, that the term 'transportation company,' as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term 'transportation company' as herein defined."

Section 4 of that act confers upon the Railroad Commission power to supervise and regulate every transportation company, power to fix their rates, fares, charges, classifications, rules and regulations, power to regulate their accounts, service and safety of operations, and, in general, power in all other matters affecting the relationship between such companies and the traveling public.

Section 5 of that act requires every transportation company to procure a certificate of public convenience and necessity from the Railroad Commission before it begins to operate, and empowers the Commission to refuse to issue certificate, or to attach such conditions to the exercise of the rights granted by the

certificate, as, in its judgment, the public convenience and necessity may require.

The classification set up in said act of 1917 has not been subjected to the test of the equal protection of the laws clause, and it is that classification which was written into section 15 of article XIII of the state constitution after the classification had remained unchallenged for nine years in the 1917 statute.

Appellants seem to rely heavily upon the decision by this court in the *Frost* case, *supra,* but this court, in considering the said 1917 act, did not pronounce unreasonable the grouping in one class for special treatment of common carriers operating for compensation upon the public highways between fixed termini or over a regular route. In 1919, the legislature of California purported, by amendment to the act of 1917, to include within the scope of that act private carriers. This court held that under the guise of highway regulation a state can not force a private carrier to assume the status of a public carrier.

In applying for certificates of public convenience and necessity under the act of 1917 the appellants proceeded voluntarily and presumably for the purpose of securing to themselves benefits and advantages which otherwise they would not enjoy. They were free to remain private or contract carriers outside of the reach of the act of 1917. From the face of that act it is apparent that it has many attractive

features for the motor carrier. It protects against undue competition from carriers of the same kind. It assures the carrier, as well as the public, of a fair rate. It puts the carrier in a position of stability conducive to the growth of its business, and is calculated to bring to the carrier the confidence of the traveling public. These are some of the reasons which justify the classification established in the act of 1917 and in section 15 of article XIII. There are other reasons. The people of California, in setting up the classification in section 15 of article XIII, and treating the members of that class differently in the matter of tax burden, doubtless had in mind not only the advantages which they possess under state protection and regulation but also the peculiar relation they bear to the public highways.

The operations of a common carrier necessarily imply regularity and frequency in the use of the public highways, and the people probably took into consideration the extent of that use. The operation of a common carrier between fixed termini or over a regular route suggests not only an extensive use of the public highways, but a regular and constant wear and tear upon the same highways or portions thereof. The tax upon motor carriers under section 15 of article XIII is essentially a property tax, by analogy from the *Pullman* case, *supra,* but, viewed as a privilege tax, it adequately meets the test of reasonableness in classification required by the fourteenth amendment.

Common carriers operating for compensation over particular routes are not unlike railroads which traverse the same path between definite points, and this court has held that railroads constitute a class whose property may be taxed differently and whose property may be taxed additionally if the state constitution does not require equality in the matter of tax burden.

Southern Railroad Co. vs. *Watts,* 260 U. S. 519; 43 S. Ct. 192.

The Supreme Court of California, discussing the Auto Stage and Truck Transportation Act of 1917 in its opinion in

Frost vs. *Railroad Commission,* 197 Cal. 230,

said:

"The primary purpose of such regulation is to secure the adequacy, regularity and reliability of service and the reasonableness of rates and charges therefor (*Franchise Motor Freight Assn.* vs. *Seavey,* 69 Cal. Dec. 473, 235 Pac. 1000). To accomplish this end there must of necessity be some restriction upon competition. As was said by the Supreme Court of Washington: 'The purpose of the transportation act * * * is to permit the establishment of regular and dependable service whenever public necessity and convenience requires. No adequate service can be given without proper equipment * * *. An income must be earned, which will cover operating costs and depreciation, and give some return on the investment or the service can not be long continued."

Discussing sections 22 and 23 of article XII of the California constitution, with particular reference to motor carriers, our Supreme Court has said in the case of

Western Association of Short Line Railroads vs. *Railroad Commission*, 173 Cal. 802,

"These automobile stage companies carry passengers to great distances, over many and devious roads. It is a part of common knowledge that one may travel by this method at least from San Diego to Sacramento, and doubtless farther—a distance of over six hundred miles. Thousands of passengers are thus carried over mountains and plains. Aside from the mere matter of the regulation of fares, every consideration suggests the desirability, if not the need, of safety regulations touching the care and upkeep of the machines, the skill and prudence of the chauffeurs, etc. And touching the movement of freight, while in many instances these truck companies parallel railroads, in others they enter, unrestricted and uncontrolled, into new territory. Modern transportation has unquestionably reached the point where it is no more an answer to the farmer who thinks that the rates of the auto truck which passes his farm are extortionate, to say that he may haul his own product, than it would be to make him the same answer if he were complaining of a railroad extortion. And, moreover, it is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a

percentage of whose revenues goes by way of taxes to the support of the state."

This court has held not only in the *Frost* case, but also in

Michigan Public Utilities Commission vs. *Duke*, 266 U. S. 570, 45 S. Ct. 191,

that a state can not, by a legislative fiat, convert property used exclusively in the business of a private carrier into a public utility for in so doing it would take private property for public use without just compensation. That pronouncement points out the fundamental difference between a common carrier and a contract carrier, and since they are members of distinct classes for the purpose of highway regulation it would seem to follow logically that they may be reasonably placed in different classes for the purpose of taxation. This court has held that the classification of auto transportation companies so as to include those who use the public highways for the transportation of passengers or freight for hire as a business, is not unreasonable, and the fact that others may make use of the same highways without being subject to an act affecting the former does not render the classification arbitrary or unreasonable, the distinction between private use and public use being sufficient upon which to base the classification.

Packard vs. *Banton*, 264 U. S. 140; 44 S. Ct. 257;
Sanger vs. *Lukens*, 24 Fed. (2d) 226;
Smallwood vs. *Jeter*, 244 Pac. 149 (155).

In the *Packard* case it is recognized that density and continuity of traffic are factors justifying particular measures, and those elements are present in the case of a common carrier using the public highways in carrying on a business between fixed termini or over a regular route.

A privilege tax imposed by a Michigan statute affecting common carriers engaged in the business of transporting persons or property for hire upon the public highways over fixed routes or between fixed termini was involved in the case of

Liberty Highway Co. vs. *Michigan Public Utilities Com.,* 294 Fed. 703.

It was there contended, as here, that the statute violated the equal protection of the laws clause, but the court sustained the statute, declaring

> "The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation, and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property, and greater damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a dis-

tinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statute was enacted will be assumed by the court. *Crescent Cotton Oil Co.* vs. *Mississippi,* 257 U. S. 129, 42 Sup. Ct. 42, 66 L. Ed. 166; *Nolen* vs. *Reichman, supra.*"

The state of Iowa has enacted a statute requiring the payment of certain license fees by automotive common carriers engaged in the transportation of passengers and freight over regular routes, on scheduled trips, and between fixed termini, upon the public highways. It survived an attack predicated upon the equal protection clause,

Iowa Motor Vehicle Association vs. *Board of Railroad Commissioners,* 221 N. W. 364 (367),

the court saying:

"It is the prerogative of the legislature to classify property for the purpose of taxation. It has done so in the instant matter. It has placed motor vehicles, engaged as common carriers in the transportation of passengers and freight over regular routes, on scheduled trips and between fixed termini, in one class, and all other commercial and miscellaneous motor vehicles in another class. This results in a legislative finding that there was sufficient difference in the use made of the public highways to justify the difference in classification. Shall this court say that there was no basis of fact for the finding? If there is any reasonable ground for the classifi-

cation and the law operates equally upon all within the same class, there is no violation of the constitutional inhibition, either state or federal, relating to class legislation, equal protection of the laws, the abridgment of privileges or immunities of citizens, or depriving persons of property or liberty without due process of law. It is presumed that the legislature acted reasonably in making the classification, and the burden is on the challenger to prove that the classification does not rest upon a reasonable basis, but is essentially arbitrary and palpably discriminating.

The state may reasonably regulate the manner and extent of the use of its public highways by common carriers, and the quantum of the privilege tax for the use of the highways need not necessarily be limited to the actual cost of such regulation, but may also, as in the instant case, include compensation for the use of highways and provision for anticipated repairs and improvements thereon. The statute in question is not class legislation because it applies only to common carriers of fixed routes. We may take judicial notice that commercial motor vehicle transportation and highway maintenance expense resulting therefrom is rapidly increasing, and that traffic on the main highways is becoming more and more congested. It is not an unreasonable classification for the legislature to make a distinction between those common carriers whose use of the highway is regular and hence more frequent and whose operation is attended with great danger of life and property and great damage to the highways, and those carriers whose use of the

highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, provided that the state of facts is sufficient to sustain the classification. See *Liberty Highway Co. et al.* vs. *Michigan Public Utilities Commission et al.* (D. C.) 294 F. 703, with cases cited."

Other cases, all tending to support the classification in section 15 of article XIII of the California constitution, are

Fish Bros. Co. vs. *Brown,* 146 N.E. 100 (103);
Barbour vs. *Walker,* 259 Pac. 552;
Willis vs. *Buck,* 263 Pac. 982;
State vs. Peterson, 198 N.W. 1011;
State vs. *Oligney,* 202 N.W. 893;
Northwest Auto Co. vs. *Hurlburt,* 207 Pac. 161 (164);
State vs. *Le Febvre,* 219 N.W. 167.

In the *Le Febvre* case, last cited, the Minnesota statute applied only to common carriers operating between fixed termini or over a regular route.

California cases dealing with motor vehicle regulations and observing the propriety of classifying motor vehicles according to considerations of horsepower, weight, and the nature and extent of use of public highways by them, are

Matter of Schuler, 167 Cal. 282;
Matter of Stork, 167 Cal. 294;
Old Homestead Bakery vs. *Marsh,* 75 Cal. App. 247;
Bacon Service Corporation vs. *Huss, supra;*
In re Schmolke, supra.

A property tax upon motor carriers using the public highways, which was in lieu of all other taxes except wheelage taxes, was the subject of consideration in the case of

Raymond vs. *Holm,* 206 N.W. 166.

Freight carriers assailed a provision in the taxing statute which separately classed and treated trucks engaged in commercial freighting "on regular time or route schedules." The court said that the complainants had the option of placing their trucks in either class; that where there is a free choice and property is placed in a particular class the one who exercises that choice "is hardly in position to claim discrimination because that class is subjected to burdens not imposed upon another class in which he could have placed it and in which he may still place it if he chooses to do so."

Further the court said:

> "The sole reason for placing or keeping the relators' truck in the class of trucks operating on a time and route schedule is to secure advantages not possessed by trucks in the other class. Unless they deemed such advantages sufficient to outweigh the additional burdens, they would not keep their truck in that class."

In concluding that the provision expressed legal classification the court said:

> "It is the province of the legislature to determine what differences furnish a sufficient reason

for placing property in one or another class for the purpose of taxation; and the legislative determination is binding on the courts unless clearly fanciful and arbitrary. The legislature is presumed to have had full information concerning the matters in respect to which it legislates, and, in view of the rules governing the courts in passing on the validity of legislative enactments, we can not say that the legislature did not find a sufficient difference in the use of the public highways by those trucks engaged in commercial freighting which operate on regular time and route schedules and those which do not so operate to permit them to be placed in different classes for the purpose of taxation. We can not pronounce the differences so wanting in substance that the classification is purely arbitrary and therefore invalid

Here, as already noted, the appellants voluntarily placed themselves in the class covered by section 15 of article XIII when they had the option of remaining outside of that class. Presumably they entered that class to secure advantages denied to carriers not in that class. That there are such advantages, in fact as well as in theory, is manifest from the decisions of the Railroad Commission of California protecting certificated common carriers operating for compensation between fixed termini or over regular routes against competition not demanded, in the opinion of the commission, by public necessity or convenience, of which the following decisions are representative.

Application of Ben Moore, 27 C. R. C. 388;
Coronado Transfer vs. *United Parcel Service of San Diego,* 31 C. R. C. 208;
Application of J. W. Ritzman, 31 C. R. C. 773;
Thornewell vs. *Gregory,* 31 C. R. C. 843;
Petaluma & Santa Rosa Ry. Co. vs. *Deysar,* 32 C. R. C. 141.

Against this array of authority appellants put forward the decision by this court in

Quaker City Cab Co. vs. *Pennsylvania,* 72 L. Ed. 609,

asserting in their brief that it is almost identical with the instant case (p. 29). It is not even similar. It is one of the very recent pronouncements by this court on the matter of classification, but to that extent only is it in point here. Therein it was held by this court that a state can not justly discriminate between corporations and individuals in imposing licensing requirements upon the conduct of the taxi-cab business for the reason that the distinction in the character of the ownership is not sufficient to warrant the differentiation in treatment.

The only case in point tending to support appellants' view is a New Jersey decision not cited by the appellants.

Weimar Storage Co. vs. *Dill,* 143 Atl. 438.

It concedes that common carriers may properly be placed in a separate class and charged a higher rate than other vehicles, but holds that it is not reasonable

to impose a tax only on common carriers or to confine it to commercial vehicles operating between fixed termini or over a regular route. The decision does not disclose the course of reasoning by which the result was reached, and the only authority cited for the conclusion expressed is the *Quaker City Cab* case, which merely reiterates the test of proper classification. Devoid of reasons therefor, the holding of the New Jersey court has little if any persuasion and it is mentioned by the appellee only because examination of the authorities has revealed its existence.

In fairness to the court from which this appeal is taken, it would seem reasonable for this court not to entertain the objection of appellants that section 15 of article XIII of the California constitution creates an unwarranted discrimination in the matter of the percentages or rates to be applied to the gross receipts base in taxing the operative property of freight and passenger carriers, for the objection is first raised in this court. But that ground of complaint is not serious. Considering the inherent differences between the types of motor vehicles designed and used in passenger transportation and in the transportation of property, in relation to their effect upon the public highways which they traverse, courts have indicated that it would be reasonable to distinguish between them in the matter of tax burden. They vary in weight, in the horsepower of the engines, in the size and construction of their tires, and consequently do not have the same effect upon the highways over which their business is conducted.

Hendrick vs. *Maryland*, 235 U. S. 610 (632);
Raymond vs. *Holm*, (Minn.), *supra;*
Iowa Motor Vehicle Asso. vs. *Bd. of Railroad Commissioners* (Iowa), *supra;*
Liberty Highway Co. vs. *Michigan Public Utilities Co., supra;*
Old Homestead Bakery, Inc. vs. *Marsh, supra;*
Matter of Schuler, supra;
Morris vs. *Duby*, 274 U. S. 135, 47 S. Ct. 548.

The many cases cited by the appellee point, we believe, irresistibly to the reasonableness of the classification created by section 15 of article XIII of the California constitution.

Repeatedly it has been declared by this court that the fourteenth amendment does not forbid classification and that the power of a state to classify for the purpose of taxation is of wide range and flexibility; provided always that the classification be reasonable, not arbitrary, and that it rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Louisville Gas and Electric Co. vs. *Coleman*, 48 S. Ct. 423.

(3) Section 15 of Article XIII of the California Constitution Does Not Deprive Appellants of Due Process of Law.

The bill of complaint alleges that the tax burden upon the carriers of the class described in section 15

of article XIII is greatly in excess of the aggregate tax burden, state and local, of contract carriers and of common carriers who do not operate between fixed termini or over regular routes, but since that section sets up a classification which courts recognize as sound, appellants can not expect relief under the due process of law clause without alleging confiscation resulting from an unconscionable tax burden resting upon them.

There is no claim by appellants that the taxes in question clearly result in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, in other words, "to spoliation under the guise of exerting the power of taxing."

Dane vs. *Jackson,* 256 U. S. 589, 599.

This court has held that a state tax does not violate the fourteenth amendment merely because it is excessive in amount. An encroachment on private rights so clear and palpable as to leave no doubt that the attempted taxation by its necessary operation is really spoliation under the guise of exercising the power to tax must be pleaded and proved before relief can be had under the fourteenth amendment.

The Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322, 335.

It is fundamental that the power of taxation of each of the states over all persons and property

within its jurisdiction is an inherent and not a delegated power and knows no limits except those imposed expressly or by plain implication in the federal constitution.

Vol. 26 R. C. L. Par. 63;
McCulloch vs. *Maryland,* 4 Wheat. 315;
State Tax on Foreign Held Bonds, 15 Wall. 300.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

The fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation.

Bells Gap Rd. Co. vs. *Pennsylvania,* 134 U. S. 232;

Henderson Bridge Co. vs. *Henderson,* 173 U. S. 592;

Wagner vs. *Baltimore,* 239 U. S. 207.

CONCLUSION

We submit, therefore, that the decree of the lower court denying the motion for an interlocutory injunction and granting the motion to dismiss the bill of complaint is a proper order and is entitled to affirmance.

Respectfully,

U. S. WEBB,
Attorney General of the State of California,

FRANK L. GUERENA,
Deputy Attorney General,
Attorneys for Appellee.

APPENDIX

EXCERPTS FROM CALIFORNIA VEHICLE ACT

(Chapter 844, Statutes 1927.)

Sec. 77. (*a*) A registration fee of three dollars shall be paid to the division for the registration of every motor vehicle, trailer or semitrailer, except for those which are exempted in this act, and such fee shall be paid at the time application is made for registration.

(*b*) In addition to the registration fee specified in subdivision (*a*) of this section, there shall be paid for the registration of every electric passenger motor vehicle a registration fee of ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

For each such vehicle weighing, when unladen, less than six thousand pounds	$50.00
For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds	70.00
For each such vehicle weighing, when unladen, ten thousand pounds or more	90.00

(*c*) The following registration fees in addition to the registration fee specified in subdivision (*a*) of this section shall be paid for the registration of vehicles, including trailers and semitrailers, designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property, according to the following table, except

that the fees specified in this subsection need not be paid for electric vehicles.

When such vehicles are equipped wholly with pneumatic tires:

For each such vehicle weighing, when unladen, three thousand pounds or more, but less than six thousand pounds---------- $20.00

For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds---------- 40.00

For each such vehicle weighing, when unladen, ten thousand pounds or more and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds--- 50.00

For each such vehicle weighing, when unladen, six thousand pounds or more and entitled under the provisions of this act to a total weight, including vehicle and load, in excess of twenty-two thousand pounds------ 70.00

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in subdivision (*a*) of this section fees according to the weight thereof unladen amounting to twice the fees set forth in the foregoing table.

Upon registration issued after the beginning of the registration year, the fees required under subdivisions (*b*) and (*c*) of this section shall be reduced by one-fourth for each three months which shall have elapsed since the beginning of the registration year.

(*d*) If the license tax provided for by that certain act entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith," heretofore adopted by the legislature at its forty-fifth session is held by the Supreme Court of the State of California, or by the Supreme Court of the United States, to be unconstitutional, then beginning with the first year next succeeding the date upon which such decision becomes final there shall be paid upon and for the registration and reregistration of every motor vehicle with the division of motor vehicles, in addition to any other fees imposed by law, a registration fee of five dollars for every electric motor vehicle and for every other motor vehicle a fee amounting to the sum of forty cents for each horsepower or major fraction thereof of such motor vehicle and a proportionate amount thereof for the registration of such vehicle for a period of less than one year. The horsepower of any motor vehicle, except electric or steam driven motor vehicles, shall be determined by the formula commonly known as that of the Association of Licensed Automobile Manufacturers (A. L. A. M.), being as follows: Square the diameter of the cylinder in inches, multiply by the number of cylinders, and divide by two and five-tenths; *provided,* that for the purposes hereof the horsepower of any steam driven motor vehicle shall be the horsepower rating fixed and advertised by the manufacturer thereof. In the

event that the registration fees for electric motor vehicles and fees based on horsepower as hereinabove specified shall be collected, all such fees shall be paid into the motor vehicle fund of the State of California, and shall be distributed and used for such purposes as may be provided by law for the distribution and use of such motor vehicle fund; *and provided, further,* that in the event the provisions of this section, relative to registration fees, based upon horsepower rating, shall become effective the provisions of this section contained in subdivisions (*a*) and (*b*) shall be deemed to be superseded.

(Chapter 752, Statutes 1927)

Sec. 78. The registration fees specified in this act, except fees for duplicate number plates or certificates, need not be paid for any motor vehicle, trailer or semitrailer owned by any foreign government or by a consul, or other official representative thereof, or by the United States, or by any state or political subdivision thereof, or owned by a voluntary fire department organized under the laws of this state when such vehicles are used exclusively for fire fighting purposes, nor for any like vehicle owned by or used exclusively in the operative work of such corporations as are taxed solely for state purposes under the constitution of this state, nor for any like vehicle used exclusively by a company in the operative work of its business of transportation of persons or property as a common carrier for compensation over any public highway of this state between fixed termini, or over a regular route, and subject to taxation under the provisions of section 15 of article XIII of the

constitution of the State of California. All such vehicles shall be registered as herein required by the person having custody thereof and such custodian shall display official registration plates bearing distinguishing marks thereon which shall be furnished by the division free of charge.

AUTO STAGE AND TRUCK TRANSPORTATION ACT

Chapter 213, Statutes 1917, Page 330.

SECTION 1. (*a*) The term "corporation," when used in this act, means a corporation, a company, an association or a joint stock association.

(*b*) The term "person," when used in this act, means an individual, a firm or copartnership.

(*c*) The term "transportation company," when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term "transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when

such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term "transportation company" as herein defined.

(*d*) The term "public highway," when used in this act, means every public street, road or highway in this state.

(*e*) The words "between fixed termini or over a regular route," when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney bus, auto truck, stage or auto stage is operated by a transportation company "between fixed termini or over a regular route" within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review. (Amended, Stats. 1925, Ch. 145, p. 297.)

SEC. 2. No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act. (Section 3 repealed by Ch. 280, Stats. 1919, p. 457.)

SEC. 4. The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation com-

pany in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts, service and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The railroad commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all transportation companies. The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the order, rule or regulation of the railroad commission shall in each instance prevail.

SEC. 5. No transportation company shall hereafter begin to operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property, for compensation, on any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any transportation company as to the

fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective, or for operations exclusively within the limits of an incorporated city, town, or city and county. Any right, privilege, franchise or permit held, owned or obtained by any transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the railroad commission. The railroad commission shall have power, with or without hearing to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require; *provided,* that no such certificate may be granted to a foreign corporation.

The railroad commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

Every application for a certificate of public convenience and necessity must be accompanied by a fee of fifty dollars. (Amended, Stats. 1927, Ch. 64.)

SEC. 6. No transportation company may issue any stock or stock certificate, or any bond, or any note or other evidence of indebtedness payable at a period of more than twelve months after the date thereof, nor execute any mortgage or other lien on any of its property to secure the payment of such indebtedness, unless such transportation company, in addition to the other requirements of law, shall first

have secured from the railroad commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that, in the opinion of the railroad commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order and that, except as otherwise permitted in the order in the case of bonds, notes and other evidences of indebtedness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. Such order may be made, in the discretion of the railroad commission, either with or without a public hearing. Except as in this section otherwise provided, the provisions of section 52 of the public utilities act referring to the purposes for which stocks and stock certificates, bonds, notes and other evidences of indebtedness, may be issued and the application of and the accounting for the proceeds thereof, the powers and duties of the railroad commission and the rights and duties of public utilities with reference thereto, the legal status of stocks and stock certificates and of bonds, notes and other evidences of indebtedness, issued without an order of the railroad commission then in effect, and the relationship of the State of California to such stocks and stock certificates, and such bonds, notes and other evidences of indebtedness, shall apply to and govern the issue of stocks and stock certificates, and of bonds, notes and other evidences of indebtedness, of transportation companies with the same force and effect as though section 52 of the public utilities act were restated in this section with the substitution of the

words "transportation companies" for the words "public utility" and of the words "transportation companies" for the words "public utilities." The provisions of section 57 of the public utilities act referring to fees to be charged and collected by the railroad commission for certificates authorizing the issue of bonds, notes or other evidences of indebtedness of public utilities shall apply to and govern authorizations by the railroad commission of the issue by transportation companies of bonds, notes or other evidences of indebtedness. (Amended, Stats. 1927, Ch. 28.)

SEC. 6*a*. Every transportation company shall annually furnish to the commission at such time and in such form as the commission may require a report in which the transportation company shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any transportation company to file monthly reports of earnings and expenses, and to file periodical or special or both periodical and special reports concerning any matter about which the commission is authorized by this or any other act to enquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. (Added Stats. 1921, Ch. 840, p. 1609.)

SEC. 6*b*. No transportation company subject to the provisions of this act shall, directly or indirectly, issue, give or tender any fare, ticket, free pass, or free or reduced rate transportation for passengers or freight between points within this state, except to such person or persons as common carriers under

and in accordance with the provisions of the public utilities act, are permitted to issue such fare, ticket, free passes, or free or reduced transportation and except to officers or employees of transportation companies as defined under this act. (Added Stats. 1921, Ch. 840, p. 1609.)

SEC. 6*c*. No transportation company shall henceforth assume any obligation or liability, as guarantor, endorser, surety or otherwise in respect of the securities of any other person, firm or corporation when such securities are payable at periods of more than twelve months after the date thereof, without having first secured from the railroad commission an order authorizing it so to do. Every such assumption made other than in accordance with the order of the railroad commission authorizing the same shall be void. (Added Stats. 1927, Ch. 37.)

SEC. 7. (*a*) In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the railroad commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court, in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act.

(*b*) No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hearing before the commission or any commissioner or examiner when ordered to do so, upon the ground

that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath have testified or produced documentary evidence; *provided,* that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any transportation company immunity of any kind. (Amended, Stats. 1925, Ch. 153, p. 302.)

SEC. 7½. (*a*) When complaint has been made to the commission concerning any rate, fare or charge for any service performed by any transportation company and the commission has found after investigation that the transportation company has charged an unreasonable, excessive or discriminatory amount for such service, the commission may order that the transportation company make due reparation to the complainant therefor with interest from the date of collection; *provided,* no discrimination will result from such reparation.

(*b*) If the transportation company does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction to recover the same. All complaints concerning unreasonable, excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the

court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a transportation company to obey an order or decision of the commission. (Added Stats. 1927, Ch. 38.)

SEC. 8. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the railroad commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation, or any part or provision thereof, is guilty of a misdemanor and is punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

SEC. 9. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress; *provided, however,* that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the railroad commission shall have the power to prescribe such reasonable, uniform and non-

discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity. (Amended, Stats. 1925, Ch. 254, p. 433.)

SEC. 10. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. The provisions of an act entitled "An act providing for the sale of street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts (approved March 22, 1905; Stats. 1905, p. 777)," are declared not to apply to the use of highways for the kind of transportation herein regulated.

o

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1929.

Bekins Van Lines, Inc., et al., Appellants, *vs.* Ray L. Riley, as State Controller of California.	Appeal from the District Court of the United States for the Northern District of California.

[November 25, 1929.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellants, as common carriers, are engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regular routes within California. The 1926 Amendment to the Constitution and the statutes of that State lay upon such carriers a tax of 5% of their gross receipts in lieu of all other taxes, while other freight carriers, common and private, by motor vehicles, are subjected to different and, it is alleged, less burdensome taxation. Cal. Const., Art. 13, Sec. 15; March 5, 1927, Chap. 19, 1927 Cal. Stats.

By this proceeding, instituted July 21, 1928, appellants ask that the constitutional amendment and the statute which undertake to lay such tax upon them be declared discriminatory and in conflict with Sec. 1, of the Fourteenth Amendment; also that an injunction issue against the State Controller forbidding him from attempting to enforce payment.

Upon motion, without written opinion, the District Court—three judges sitting—dismissed the bill. The cause is here by direct appeal; and the only matter for our determination is the validity of the challenged classification.

The power of a State in respect of classification has often been declared by opinions here. We are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed.

Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits.

That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost* v. *Railroad Commission,* 271 U. S. 583 and *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570. Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by *Raymond* v. *Holm,* — Minn. — (Dec. 4, 1925); *State* v. *Le Febvre,* — *Minn.* — (April 13, 1928); *Iowa Motor Vehicle Ass'n.* v. *Board of Railroad Commissioners,* — Iowa — (Sept. 28, 1928); *Liberty Highway Co.* v. *Michigan Public Utilities Commission,* 294 Fed. 703. Their use of the highways probably will be regular and frequent and, therefore, unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers.

Although relied upon by counsel and said to be almost identical with the case at bar, *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, gives no support to claim of undue discrimination. We regard the controversy as not open to serious doubt and further discussion of it seems unnecessary.

A true copy.

Test:

Clerk, Supreme Court, U. S.